In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1584

GREYHOUND LINES, INC.,

Petitioner,

vs.

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO
and
THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner respectfully prays that this Court grant a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit. The judgment affirmed the issuance of a preliminary injunction in an arbitrable labor dispute.

OPINIONS BELOW

The opinion of the District Court (Appendix A, below, pp. 1-11) is neither officially nor unofficially reported. The

opinion of the Court of Appeals (Appendix B, below, pp. 12-22) is unofficially reported at 78 C.C.H. Lab. Cases ¶ 11,253. It has not yet been officially reported.

JURISDICTION

The Judgment of the Ninth Circuit Court of Appeals was entered on January 30, 1976. Section 1254(1) of Title 28 of the United States Code grants this Court jurisdiction to review that Judgment by writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a) ("Section 301"), gives the district courts of the United States jurisdiction to hear actions "for violation of contracts between an employer and a labor organization . . . ."

This Petition asks this Court to resolve issues with respect to whether, when and how far the federal judiciary may intrude itself into the settlement of arbitrable labor disputes. Those basic labor law issues have never been before this Court in the context in which this case presents them.

Here the union asserted that the parties' collective bargaining agreement prohibited action which the employer said it was going to take. The dispute was arbitrable under the collective bargaining agreement. The employer agreed to arbitrate, but did not agree to maintain the status quo pending arbitration. The union filed suit under Section 301 and obtained a preliminary injunction restraining the employer from taking the action pending the arbitrator's decision. The questions raised are these:

1. May a district court intervene in a labor dispute and issue a preliminary injunction which enjoins an employer

from taking action pending arbitration where the employer has done everything it promised to do to resolve the dispute and the preliminary injunction is not necessary to preserve the arbitrator's jurisdiction or ability to resolve the dispute?

2. In light of the controlling principle established by the *Steelworkers' Trilogy*[1] that the interpretation and application of collective bargaining agreements is for the arbitrator and not for the courts, may a district court in effect add terms to the agreement and then enjoin the employer from violating the terms it—not the arbitrator—added? The decision of the Ninth Circuit in this case approves such judicial intervention, and it is necessarily in conflict with the opinion of the Sixth Circuit in *Detroit News Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

3. May a district court enjoin an employer from taking certain action pending arbitration and thereby grant preliminarily the very relief which only the arbitrator could grant permanently when there is no showing or finding that the union has a likelihood of success on the merits before the arbitrator? The Second Circuit has held "no." *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The Ninth Circuit held "yes" in this case.

4. May a district court issue a preliminary injunction restraining an employer from taking action pending arbitration without making the injunction bond payable upon the union's losing on the merits before the arbitrator?

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1. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

STATUTES INVOLVED

The statutes involved in this Petition are Sections 203 (d) and 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. §§ 173(d) and 185(a), 61 Stat. 154, 156. The official text of the pertinent provisions follows:

> *Section 203(d):* "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."
>
> *Section 301(a):* "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Northern District of California under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, ("Section 301"). Jurisdiction in the district court was based upon Section 301 and upon 28 U.S.C. § 1337. This action is not, however, an ordinary Section 301 suit to compel arbitration, for the employer was willing to arbitrate. It is a suit to enjoin an employer from acting pending arbitration.

The employer is Greyhound Lines, Inc. ("Greyhound" or the "Company"). It is a national corporation and is an employer in an industry affecting commerce within the meaning of Sections 2(2) and 2(7) of the Labor-Management Relations Act of 1947 (the "Act"), 29 U.S.C. § 152(2) and (7). (App. A, p. 2) The plaintiffs are Amalgamated

Transit Union, Division 1384, AFL-CIO, and The Amalgamated Council of Greyhound Divisions, AFL-CIO. Division 1384 represents Greyhound bus drivers in the Vancouver-Portland area and the Council represents all Greyhound bus drivers. Both the Division and the Council are labor organizations within the meaning of Section 2(5) of the Act, 29 U.S.C. § 152(5). (App. A, p. 2) Division 1384 and the Council are referred to in this Petition collectively as "the Union".

Greyhound and the Union have been parties to a series of collective bargaining agreements for many years. The current collective bargaining agreement (the "Agreement") contains provisions which govern the resolution of disputes arising from the Agreement. Specifically, the Agreement prohibits the Union from striking and prohibits the Company from engaging in a lockout. The Agreement also provides for the resolution of disputes by binding arbitration. (App. A, p. 2) There is no provision which requires Greyhound to maintain the status quo pending arbitration where it takes action which the Union contends violates the Agreement.

On April 17, 1975, the Company notified the Union that it was going to change the work cycles on bus runs from Vancouver to Seattle and Seattle to Portland from six days on, three days off and four days on, three days off, respectively, to five days on, two days off. The change was to be effective June 25. (App. A, pp. 2-3; App. B, p. 13)

The Union protested the change and contended that the Agreement prohibited the Company from making the change without the Union's consent. The Company contended that it had a perfect right under the collective bargaining agreement to make that change. The Union asked the Company to arbitrate the dispute immediately and,

pending arbitration, to maintain the status quo. The Company agreed to immediate arbitration and named the Company's arbitrator. It declined to maintain the status quo pending arbitration. (App. A, p. 3; App. B, p. 13) Rather than taking the Company up on its offer to conduct immediate arbitration, the Union filed this proceeding on June 2, 1975. (App. B, p. 13)

The complaint sought to enjoin the implementation of the new 5-2 run cycle pending arbitration, and the Union moved for a preliminary injunction. The District Court set the matter for an evidentiary hearing on June 17, 1975. At the outset of the June 17 hearing, the District Court ruled that the question whether the Union had a reasonable likelihood of success on the merits before the arbitrator was irrelevant, and accordingly ruled that no evidence was to be introduced upon that issue.

The matter was argued on June 19. At that argument the Court expressed its opinion that the Union's showing of irreparable injury was "flimsy at best". Then on June 20 the Court issued its Order granting a preliminary injunction prohibiting Greyhound from changing the "present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement." (App. A, p. 10)

In issuing that injunction the District Court did not find that Greyhound's refusal to refrain from making the run changes pending arbitration violated the Agreement; there was nothing before the Court from which it could have so found. Moreover, the District Court did not find that issuance of the preliminary injunction was necessary to preserve the jurisdiction or ability of the arbitrator to resolve the dispute; there was nothing before the Court from which it could have so found. Finally, the District

Court did not find that the Union had a likelihood of success before the arbitrator; there was nothing before the Court from which it could have found that either.[2]

The Order provided that the Union should file a $10,000 bond for "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction." (App. A, p. 10) Greyhound moved for an order to require the bond to cover attorneys' fees in accordance with the specific provisions of the Norris-LaGuardia Act, 29 U.S.C. § 107, and to require that the bond be conditioned so that it was payable upon the arbitrator awarding in favor of Greyhound. On June 30, 1975 the Court issued its Order raising the amount of the bond by $5,000 and denying Greyhound's motion with respect to the bond in all other respects. (App. B, p. 15)

The Ninth Circuit affirmed the District Court's orders.[3]

With respect to the preliminary injunction, the Ninth Circuit properly recognized that this Court's decisions in the *Steelworkers' Trilogy* and *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), among others, establish that labor disputes are to be resolved by arbitration; that therefore the federal judiciary is not to intrude itself into them; and that those rules are at the central core of the national labor relations policy. Then it concluded that a

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2. The District Court did find that the Union's position before the arbitrator was "not plainly without merit." (App. A, p. 6) That, however, was not the proper test to apply and, since all evidence going to the merits had been ruled out, there was nothing before the Court from which it could properly make that finding anyway.

3. It did hold that the District Court erred in failing to include attorneys' fees in the coverage of the bond but concluded that Greyhound had not been injured by that error. (App. B, p. 22)

district court may adopt standards for the issuance of a preliminary injunction in an arbitrable labor dispute which are lower—not higher—than those which are required in other contexts. (App. B, pp. 17-18) Like the District Court, the Ninth Circuit did not concern itself with whether the failure of Greyhound to maintain the status quo pending arbitration violated some provision of the collective bargaining agreement; similarly, it did not address the issue of the absence of any finding or showing that the preliminary injunction was necessary to preserve the jurisdiction or ability of the arbitrator to resolve the dispute. The Ninth Circuit essentially affirmed the District Court's holding that no likelihood of success before the arbitrator need be shown, for it ruled that one "need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor" to obtain a preliminary injunction which grants pending arbitration the very relief which only the arbitrator can grant permanently. (App. B, p. 18)

With respect to the conditioning of the bond, the Ninth Circuit held that the District Court was correct in refusing to condition the bond to call for payment upon the Union's losing before the arbitrator. It reasoned that to hold otherwise "would fly in the face of our earlier holding that a showing by the plaintiff of probable success is not necessary . . . ." (App. B, p. 22)

Thus the opinion of the Court of Appeals establishes these untenable propositions: *One* An employer who has done everything he promised to do to resolve a labor dispute may nevertheless be enjoined from taking the action which is the subject of that dispute pending arbitration notwithstanding the facts that there is no violation of the contract to enjoin; that the injunction is not necessary to preserve

the jurisdiction or ability of the arbitrator to resolve the dispute; and that the union has not shown any likelihood of success before the arbitrator. *Two* Thereafter, the union may lose before the arbitrator and leave the employer with no recourse on the injunction bond for the damages suffered by being restrained from taking the action which it had a perfect right to take.

The obvious unfairness of that result is not academic here, for it is exactly what happened in this case. Greyhound prevailed in the arbitration and now finds itself without recourse on the bond for the damages it suffered while this injunction stopped it from doing what it had a perfect right to do.

Besides being unfair, the principle established by the Ninth Circuit is contrary to Section 301 and to the controlling principles of labor law as announced by this Court. Accordingly, Greyhound petitions this Court to review the Judgment of the Ninth Circuit by writ of certiorari.

REASONS FOR GRANTING THE WRIT

This Petition raises issues with respect to the circumstances under which a district court may restrain an employer in an arbitrable labor dispute from taking action pending arbitration. Although this Court has given particular attention to the relationship of the federal judiciary to the labor arbitration process,[4] it has never before directly passed upon these issues. The issues present important questions as to whether, when and to what extent the federal

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4. *E.g., Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368 (1974); *Local 150, Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487 (1972); *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970); The *Steelworkers' Trilogy,* 363 U.S. 564, 574, 593 (1970); *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957).

judiciary may intrude itself into labor disputes, and these issues have not been, but should be, settled by this Court. Moreover, suits by unions to require employers to maintain the status quo pending arbitration have become increasingly frequent in recent years,[5] and therefore it is particularly appropriate that this Court now provide guidance to the lower courts as to when, if ever, such injunctions should issue.

Moreover, the Court of Appeals decided those important federal questions contrary to the applicable labor law principles established by this Court and contrary to sound labor law policy. The Ninth Circuit lowered the barriers to obtaining injunctive relief in an arbitral labor dispute and then held that a union which loses on the merits is not liable on the bond. If that decision is permitted to stand, there will be virtually no restraint on a union's seeking a preliminary injunction over an arbitrable labor dispute every time an employer takes some action the union does not like. That is so because such injunctions will be easy to obtain and because they can be obtained with impunity. The results would be that unions could routinely prevent management from managing regardless of the merits of the dispute, and that the Courts would routinely intrude themselves into those disputes.

Finally, the opinion of the Ninth Circuit in this case is in conflict with the opinion of the Second Circuit in *Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974), and is in conflict with the opinion of the Sixth Circuit in *Detroit News. Pub. Ass'n. v. Detroit Typo. Union No. 18*, 471 F.2d 372 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

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5. *E.g., Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974); *Pittsburgh News. Print. Press. Union No. 9 v. Pittsburgh Press Co.*, 479 F.2d 607 (3d Cir. 1973).

The Ninth Circuit interprets the *Steelworkers' Trilogy* to require courts to lower the barriers to the granting of injunctive relief in cases such as this one. (App. B, pp. 17-18) The Second Circuit has ruled that the *Trilogy* requires courts to "continue to exercise the sound discretion of the chancellor" in such cases. *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The Ninth Circuit affirmed what was in effect the judicial implication and enforcement of a promise by Greyhound to maintain the status quo pending arbitration. The Sixth Circuit has held that under the *Steelworkers' Trilogy* even an express promise by an employer to maintain the status quo pending arbitration cannot be enforced by the courts but must be left to the arbitrator. *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). Since the *Steelworkers' Trilogy* forms the primary source of the principles which govern the relationship between courts and arbitrators, it is important for this Court to resolve these conflicting interpretations of it.

A. A District Court Can Not Issue a Preliminary Injunction Where There Is No Wrong to Enjoin and Where the Arbitral Process Is Working By Itself.

Section 301(a) grants the district courts jurisdiction to hear suits "for violation" of labor contracts. Therefore, any injunction which issues by virtue of that authority must be based upon some violation of a labor contract and can be directed against only that action which would constitute the violation. This is established by Section 301 itself and by the decisions of this Court.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), for example, this Court declared that a party could not be ordered to arbitrate a dispute

unless the court first found that the party's refusal to arbitrate was in violation of the labor contract, 363 U.S. at 582. *Accord, John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 546-47 (1964); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241 (1962). Similarly, a union cannot be enjoined from striking unless it is first found that the strike is in violation of the union's contractual duty not to strike. *E.g., Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 380 (1974).

Here the District Court enjoined Greyhound from changing the work cycle on the Vancouver-Seattle and the Seattle-Portland bus runs pending the arbitrator's decision. Neither the District Court nor the Court of Appeals concluded that Greyhound's decision not to maintain the status quo violated the collective bargaining agreement (App. A; App. B). There is no basis upon which such a conclusion could have been made, and therefore the preliminary injunction lacked its necessary jurisdictional basis.

To begin with, the Agreement does not obligate Greyhound to maintain the status quo pending arbitration; nowhere did Greyhound promise to do so. What Greyhound did promise to do was to process disputes through arbitration. (App. A, p. 2) Since Greyhound was ready to keep that promise (App. A, p. 3; App. B, p. 13), it had done everything it promised to do to resolve the dispute and there was no wrong to enjoin it from doing. Fundamental equitable principles as well as the specific words of Section 301 dictate that an injunction cannot issue where there is no wrong or "violation" to enjoin.

Moreover, the preliminary injunction issued here was not necessary to preserve the jurisdiction or ability of the arbitrator to resolve the dispute and therefore it improperly intruded the court into the arbitral process.

Congress has declared that the preferred method for the settlement of labor disputes is "[f]inal adjustment by a method agreed upon by the parties . . . ." Section 203(d) of the Act, 29 U.S.C. § 173(d). Ever since the *Steelworkers' Trilogy* this Court has made it clear that "[t]hat policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining is given full play." *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 566 (1960). The teaching of the *Steelworkers' Trilogy* is that where the parties have agreed to submit a dispute to arbitration, "the function of the court is very limited." *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567 (1960). "The judiciary sits . . . to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict." *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 585, (1960). The arbitrator "sit[s] to settle disputes." *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 596 (1960).

A party who refuses to arbitrate a dispute he promised to arbitrate may be ordered to arbitrate. In such a situation the reluctant party has violated the dispute resolution provisions of the collective bargaining agreement, and judicial intervention is necessary to make the arbitral process work. *United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957). Similarly, where a party faced with an arbitrable dispute tries to thwart the arbitral process by force or by acting in such a way as to render the arbitrator's decision futile, he has in effect violated his promise to arbitrate because he has made it impossible for the arbitral process to work. Here, too, the judiciary may intervene. *Boys*

Markets v. Retail Clerks Union, 398 U.S. 235, 253-54 (1970); *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960).

However, the *Steelworkers Trilogy* and other decisions of this Court establish the principle that a court may not intervene in an arbitrable labor dispute where its intervention is not necessary to make the arbitral process work. That is so because the parties bargained for a decision by the arbitrator. Where the arbitral process is working by itself and the arbitrator has the jurisdiction and ability to settle the dispute, there is no need for the courts to intervene and therefore the courts should stay out of it.

Thus in *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970) this Court held that a district court may enjoin a violation of a no-strike clause where the strike is over an arbitral dispute. In *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 370 U.S. 254 (1962), this Court held that a district court may not entertain an action for damages for violation of a no-strike clause which is also an arbitrable dispute. In the first case an injunction was required to make the arbitral process work, because the strike thwarted that process; therefore the judiciary could intervene. In the second there was no need for judicial involvement since the arbitral process was working by itself; therefore the judiciary could not intervene.

This Court reached a similar result in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R.,* 363 U.S. 528 (1960), a case brought under the Railway Labor Act, 45 U.S.C. § 151 et seq. That case holds that a court may condition the issuance of an injunction against a strike upon an employer's maintaining the status quo pending arbitration, but only where that condition is necessary "to preserve

the jurisdiction of the [Arbitrator]. . . ."[6] That is, where absent the condition, "a decision of the . . . . [Arbitrator] in the unions' favor would be but an empty victory." 363 U.S. at 534. *Accord, Local Lodge 2144 v. Railway Express Agency, Inc.,* 409 F.2d 312, 318 (2d Cir. 1969); *Westchester Lodge 2186 v. Railway Express Agency, Inc.,* 329 F.2d 748, 753 (2d Cir. 1964); *Local 757 v. Budd Co.,* 345 F. Supp. 42, 47 (E.D. Pa. 1972) (a Section 301 case). More recently, this Court held that a union may be enjoined from striking when it has not performed its statutory duty to "exert every reasonable effort to make and maintain agreements . . . ."[7] but only where "such a remedy is the only practical, effective means of enforcing the duty . . . ." *Chicago & N.W. Ry. v. United Transportation Union,* 402 U.S. 570, 583 (1971).

These cases underscore and illustrate the "very limited" role which courts may play in resolving labor disputes. The principle they lay down is that an employer may not be restrained from taking disputed action pending arbitration except where such an injunction is necessary "to preserve the jurisdiction" of the arbitrator, and then only when that remedy is the "only practical, effective means" of insuring that the exercise of that jurisdiction will not be "futile."

That is hardly this case. Had Greyhound put the new runs into effect and had the arbitrator ruled for the Union (he did not), the arbitrator could simply have ordered Greyhound to put the old runs back into effect, and Greyhound could have done that. All that would have happened in the meantime is that the drivers would have had to work for five days a week for pay. An arbitrator can provide

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6. The Adjustment Board is the arbitrator.

7. Section 2, First of the Railway Labor Act, 45 U.S.C. § 152, First.

a remedy for an injury like that, if it be an injury—for example, by awarding overtime for the fifth day or by awarding extra vacation days. The fact that the Union in this case apparently preferred some other remedy is beside the point. The Union bargained for a remedy fashioned by the arbitrator and so long as that remedy is effective, a court must "hold the . . . . [Union] to its bargain." *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers,* 370 U.S. 254, 266 (1962). See *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 599 (1960).

Accordingly, the issuance of this preliminary injunction was directly contrary to the labor law principles as set forth by this Court. The employer was willing and ready to arbitrate the dispute; had therefore done everything he promised to do; and there was no wrong—or Section 301 "violation"—to enjoin him from doing. Moreover, the arbitral process was working by itself; the injunction was not necessary to preserve the jurisdiction or ability of the arbitrator to fashion an appropriate remedy; and there was no need for the judiciary to become involved in the dispute.

This is the first court of appeals decision affirming the issuance of a preliminary injunction against an employer in a situation such as that, and for that reason alone this is an important case. But in recent years several district courts have similarly overstepped the limitations which Congress and the principles behind the decisions of this Court have placed on them.[8] If the decision of the Ninth

8. For example, in *Letter Carriers v. U.S. Postal Service,* 88 LRRM 2678 (S.D. Ia. 1975), the district court enjoined the postal service from eliminating a ten-minute wash-up period pending arbitration although the parties were willing to and in fact were in the process of arbitrating the dispute.

Circuit is permitted to stand, this increasing judicial overactivity in arbitrable labor disputes can only be encouraged.

The principles which this Court has laid down and with which the Ninth Circuit's opinion is apparently in conflict have never been applied by this Court in a case such as this. Such a case has in fact never been before this Court. The lower courts need guidance as to how those principles are to be applied in such a case. Therefore this Court should grant the Petition with respect to the first Question Presented.

B. A District Court Can Not Issue a Preliminary Injunction to Restrain an Employer from Violating Terms Which the Court —Not the Arbitrator—Has Implied Into the Collective Bargaining Agreement.

This is not a case in which the issuance of a preliminary injunction was necessary to preserve the jurisdiction or ability of the arbitrator to resolve an arbitral labor dispute. (Part A, above) This is also not a case in which an employer violated a promise to maintain the status quo pending arbitration, for Greyhound never promised to do that. Thus there was neither a justifiable labor law reason for the injunction nor any wrong against which the injunction might properly issue. The injunction which issued rewrote the parties' Agreement by adding new terms to it to which neither party had agreed. In effect, the District Court implied a promise by Greyhound to maintain the status quo pending arbitration and then enjoined Greyhound from violating the promise which it—not the arbitrator—had implied.

That is directly contrary to the controlling labor law principles set forth in the *Steelworkers' Trilogy.* In the *Steelworkers' Triology* this Court held that "the question

of interpretation of the collective bargaining agreement is a question for the arbitrator;" and that "the courts have no business" becoming involved in making such interpretations. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

> "[I]n the *Steelworkers Trilogy* we emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 242-43 (1970).

Moreover, there is nothing in this Agreement from which to imply the new term the District Court implied. Nor is there anything in the general body of labor law from which to imply that new term, because the "quid pro quo" for a no-strike clause is an employer's promise "to submit grievance disputes to the process of arbitration." *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 248 (1970); *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 455 (1957). Therefore, if any such term is to be implied into that Agreement it must be implied from "the industrial common law—the practices of the industry and the shop." Since only the arbitrator has the expertise and authority to interpret and apply that "industrial common law," *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581-82 (1960), only the arbitrator can imply any promise based upon it. The decision of the lower courts judicially to imply that promise improperly intruded them into the arbitrator's role and violated the command of the *Trilogy*.

Finally, the decision below is necessarily in conflict with the Sixth Circuit's opinion in *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). There the Sixth Circuit

held that an express promise by an employer to maintain the status quo pending arbitration should not be construed and enforced by the courts, but should be left to the arbitrator. 471 F.2d at 875. Here the Ninth Circuit not only permitted the District Court in effect to imply such a promise but also permitted the District Court to construe and enforce that implied promise by enjoining a "violation" of it.

This Court should grant the Petition with respect to the second Question Presented to correct the lower court's departure from this Court's prior decisions and to resolve the conflict between the Ninth and Sixth Circuits.[9]

C. A District Court Can Not Issue a Preliminary Injunction Without Requiring a Showing That the Union Has a Likelihood of Success Before the Arbitrator.

Greyhound's action about which the Union complained was the change in the work cycle on the Vancouver-Seattle and the Seattle-Portland bus runs from 6-3 and 4-3, respectively, to 5-2. The Union sought from the arbitrator a ruling that the Company could not make the change and that the old work cycle had to continue in effect. The Union sought and obtained from the District Court a preliminary injunction which held, pending arbitration, that the Company could not make the change and that the old work cycle had to continue in effect. Therefore, the District

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9. The Ninth Circuit's decision also constitutes bad labor policy for yet another reason: Its effect is to grant the Union the right to stop Greyhound from taking action pending arbitration any time Greyhound does something the Union does not like. That is a right the Union was unable to win at the bargaining table, assuming it ever tried. It is a right which other unions have been able to obtain. See, for example, the status quo provision contained in the labor contract involved in *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872, 878 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). The acquisition of that right should be left to the collective bargaining process. See App. B, pp. 20-21.

Court did not intervene to enforce the dispute settlement procedures of the collective bargaining agreement. Instead, its preliminary injunction directly controlled the parties' primary conduct and in fact granted preliminarily the very relief which only the arbitrator could grant permanently.

That is an extraordinary judicial intervention into a labor dispute, and it could be justified only by an extraordinary situation, which is not present here. (Part A, above) What makes this case even more remarkable is that that relief was granted without requiring any showing by the Union that it had a probability of success on the merits before the arbitrator. In fact, the Union lost before the arbitrator. Thus, the preliminary injunction granted the Union a right it did not have where there was no showing that it was even likely that the Union had that right. The Ninth Circuit's opinion, which condones that result, is contrary to fundamental principles of equity and to *Boys Markets v. Retail Clerks Union,* 398 U.S. 235 (1970) which incorporates those principles. It is also directly in conflict with the opinion of the Second Circuit in *Hoh v. Pepsico, Inc.,* 491 F.2d 556 (2d Cir. 1974).

Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974) holds that in a Section 301 suit to enjoin an employer from taking action pending arbitration, plaintiff must show "some likelihood of success . . . in obtaining [from the arbitrator] the award in aid of which the injunction is sought." 491 F.2d at 561. Judge Friendly put it this way:

> "[T]he 'ordinary principles of equity' referred to as a guide in the portion of the *Sinclair* dissent that was approved in *Boys Markets* include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2 Cir. 1953). We think this must mean not simply some likelihood of

> success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. . . . It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit.
>
> We see little reason to think the unions here have met the requirement of showing some likelihood of ultimate success." 491 F.2d at 561.

Accord, Pittsburgh News. Print. Press. Union No. 9 v. Pittsburgh Press Co., 343 F. Supp. 55 (W.D. Pa. 1972), *aff'd,* 479 F.2d 607 (3d Cir. 1973). That is a plain, ordinary equitable principle. It should have been applied here because *Boys Markets* holds that ordinary equitable principles apply to Section 301 suits. *Boys Markets v. Retail Clerks Union,* 398 U.S. 235, 254 (1970); *Hoh v. Pepsico, Inc.,* 491 F.2d 556, 561 (2d Cir. 1974).

The Ninth Circuit declined to follow the language of *Boys Markets* and Judge Friendly's decision in *Hoh.* It concluded that "a plaintiff . . . seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Market,* need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." (App. B, p. 18) It held that the *Steelworkers' Trilogy* dictated a "partial lowering" of the barrier "to obtain a preliminary injunction to maintain the status quo pending arbitration." (App. B, p. 17) That reading of the *Trilogy* is directly in conflict with that adopted by the Second Circuit:

> "Although the courts have been directed by the *Steelworkers'* Trilogy . . . to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they

must continue to exercise the sound discretion of the chancellor." 491 F 2d at 561.

Moreover, the *Steelworkers' Trilogy* holds that courts should not become involved in labor disputes. The Ninth Circuit's ruling that a preliminary injunction regulating primary conduct in a labor dispute should be easier to obtain than in an ordinary case is irreconcilably in conflict with that holding.

Whether a probability of success before the arbitrator must be shown before one can obtain an injunction which grants preliminarily the relief which only the arbitrator can grant permanently is an important issue of labor-management relations upon which this Court has never ruled. This Court should grant the Petition with respect to the third Question Presented to decide that issue and to resolve the conflict between the Ninth and Second Circuits.

D. A District Court Should Not Issue Such a Preliminary Injunction Without Conditioning the Bond to Call for Payment Upon the Union's Losing Before the Arbitrator.

The Ninth Circuit refused to condition the bond to call for payment upon the Union's losing on the merits before the arbitrator. Thus the Ninth Circuit rule is that a union may obtain from a court the very relief which only the arbitrator is supposed to give, then lose on the merits before the arbitrator and leave the company without a remedy on the bond. That is unfair because one who wins on the merits ought to win on the bond. That is the general rule; one who is enjoined preliminarily but who ultimately prevails on the merits had a right to do what the preliminary injunction prevented him from doing; therefore he has been "wrongfully enjoined," and he may recover on the

injunction bond. *Arkadelphia Milling Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 144 (1919).

In the ordinary case the court decides the merits; in a Section 301 case the arbitrator decides the merits. Therefore, in a Section 301 case a defendant should recover on the bond if he prevails on the merits before the arbitrator.[10] This case demonstrates the obvious unfairness of the contrary result. Greyhound prevailed in the arbitration and now has no recourse on the bond for the damages it suffered by being restrained from doing that which under the Agreement it had a perfect right to do.

The Ninth Circuit's refusal to adopt the ordinary[11] rule stems from its belief that to do so would "fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Market* preliminary injunction." (App. B, p. 22) That is a classic non sequitur. If a court order prevents an employer from taking action which he had a right to take, then he has been wrongfully restrained. The fact that the

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10. *Local 757 v. Budd Co.*, 345 F. Supp. 42, 46-47 (E.D. Pa. 1972) and *United Steelworkers v. Blaw-Knox Foundry & Mill Machinery, Inc.*, 319 F. Supp. 636, 641 (W.D. Pa. 1970) adopt that rule in Section 301 cases. Language from *Hoh v. Pepsico, Inc.*, 491 F.2d, 556, 560-61 n. 8 (2d Cir. 1974) suggests that this is also the rule in the Second Circuit. ("Counsel candidly stated that he could afford no assurance that the unions could post a bond *adequate to protect the employer against losses if the arbitrator should rule against the unions.*") The opinion of the Third Circuit in *United States Steel Corp. v. United Mine Workers*, 456 F.2d 483, 488 (3d Cir.), *cert. denied*, 408 U.S. 923 (1972) is consistent with that of the Court below.

11. The Court cited Rule 65(c), Fed. R. Civ. P. in support of its result (App. B, p. 21). That rule, however, states that an injunction bond should be conditioned to be payable upon a finding that a party has been "wrongfully enjoined or restrained." One who ultimately wins on the merits has been "wrongfully enjoined or restrained." See text.

Ninth Circuit has lowered the normal equitable barriers to make it easier to obtain that restraint does not make the restraint any less wrongful, and therefore it should not deprive the employer of his ability to recover on the bond for the damages which that wrongful restraint caused.

If the opinion of the Ninth Circuit is permitted to stand, it seems likely that practically every time an employer does something a union does not like and which is subject to arbitration, the union will ask a federal district court to enjoin that action pending arbitration. Pursuant to the lowered barriers which that opinion establishes, it will be easy for a union to obtain such an injunction; but even if the union is unsuccessful, it will have lost nothing by the attempt. If the union is successful, it will run virtually no risk, because even if it loses on the merits it will have no liability on the bond to the employer for the damages which the preliminary injunction has caused. That is bad equity; it is also bad labor law because it will result in ever-increasing judicial involvement in arbitrable labor disputes.

The conditions on which a labor injunction bond becomes payable in a case such as this have never been passed upon by this Court. This Court should pass upon that issue now because it is an important, undecided issue with respect to the relationship between courts and arbitrators; because that issue is integrally interrelated with the questions raised by the first three Questions Presented; and because the opinion below announces an unjust and unsound principle.

CONCLUSION

Petitioners respectfully pray that this Court grant a writ of certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: April 27, 1976.

Respectfully submitted,

OWEN JAMESON
DAVID M. HEILBRON
RICHARD C. BRAUTIGAM
McCUTCHEN, DOYLE, BROWN & ENERSEN

Attorneys for Petitioner
Greyhound Lines, Inc.

(Appendices Follow)

Appendix A

United States District Court
Northern District of California

No. C-75-1092 WHO

AMALGAMATED TRANSIT UNION, DIVISION 1384, AFL-CIO; and THE AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS, AFL-CIO,

Plaintiffs,

vs.

GREYHOUND LINES, INC., a corporation,

Defendant.

ORDER GRANTING PRELIMINARY INJUNCTION

[June 20, 1975]

Plaintiffs, Amalgamated Council of Greyhound Divisions, AFL-CIO ("the Council") and Amalgamated Transit Union, Division 1384 ("Division 1384"), brought this action to enjoin defendant, Greyhound Lines, Inc. ("Greyhound"), from implementing certain proposed changes in the weekly work cycle of bus drivers within the jurisdiction of Division 1384. An evidentiary hearing was held on June 17, 1975, and oral argument was heard on June 19. The Court having considered the testimony of witnesses, the affidavits on file in this matter, and the written and oral argument of counsel, grants the application for a preliminary injunction for the reasons hereinafter indicated.

The Council is a labor organization representing bus drivers and other persons employed by defendant through-

out the United States, including California, for the purpose of collective bargaining. It is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act ("the Act"), as amended, 29 U.S.C. § 152(5). The Council is comprised of numerous locals, including Division 1384. Members of Division 1384 are employed by Greyhound in the states of Oregon and Washington and in British Columbia, Canada. It is also a labor organization within the meaning of 29 U.S.C. § 152(5).

Greyhound is a national corporation licensed to carry on business within the State of California and is an employer in an industry affecting commerce within the meaning of Sections 2(2) and 2(7) of the Act, as amended, 29 U.S.C. § 152(2), (7).

Plaintiffs and defendant have for many years been parties to a series of collective bargaining agreements covering Greyhound employees who work in the Western United States. The extant agreement ("the Agreement") between the parties contains provisions for the peaceful resolution of disputes: plaintiffs are prohibited from striking, defendant is barred from conducting a lockout, and the parties are compelled to resolve all disputes through a grievance procedure, the last step of which is final and binding arbitration.

On April 17, 1975, defendant notified Division 1384's business agent that it intended to change the weekly work cycle for certain bus runs in the Pacific Northwest effective June 25. The weekly work cycle ("the cycle") is the term used to describe the ratio between a driver's number of days of work and his or her number of days off per scheduling period. Specifically, Greyhound sought to change its bus runs from 6 days on, 3 days off and 4 days on, 3 days off cycles to a 5 days on, 2 days off cycle. A week later, Division

1384 notified Greyhound by mail that the changes could not be effectuated without the consent of the union pursuant to Section 43 of the Agreement.[1]

On May 22, 1975, Division 1384 suggested by letter that the proposed changes violated not only Section 43 of the Agreement, but Section 100 as well.[2] The letter proposed that the dispute be arbitrated prior to the implementation of the change, but Greyhound countered that although arbitration was the proper forum for resolution of the disagreement, such arbitration need not precede the changeover. Accordingly, Greyhound refused to accede to the union's proposal that the *status quo* be maintained pending arbitration.

Greyhound drivers "bid" for their runs on a yearly basis pursuant to Section 47 of the Agreement, and bidding this year opened in late May and continued until June 7. Because defendant had announced the proposed change in the cycle prior to the opening of bidding and had refused to maintain the *status quo* pending arbitration, drivers bid on 5 on, 2 off runs rather than on runs scheduled under the existing cycle. The bidding is now closed, and new runs have been assigned.

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1. Section 43 provides in pertinent part:
"RUN SET UPS—Insofar as possible, regular runs will be assigned five (5) days per week or ten (10) days in fourteen (14) days. This section can be modified to conform to local conditions upon written mutual consent by the Union and the Company."

2. Section 100 provides in pertinent part:
"EXISTING COMPANY RULES. It is agreed that all existing rules and regulations relating to operation and conduct of Company's business not in conflict with provisions of this Agreement shall remain in effect until superseded or changed by subsequent rules and regulations not in conflict with this Agreement. The Company agrees that they [sic] will not change any rule or regulation that affects the employees beneficially without mutual agreement."

Plaintiffs filed this action on June 2, 1975, in an attempt to enjoin the implementation of the new run schedule pending arbitration. Section 301(a) of the Act, 29 U.S.C. § 185(a). After a brief hearing on plaintiffs' motion for a temporary restraining order on June 4, I declined to issue such an order on the ground that no injunctive relief was then necessary since the bidding was nearly completed, and the new cycle was not scheduled to go into effect for three weeks. The parties filed additional memoranda and affidavits, and the evidentiary hearing followed.

Neither side disputes the propriety of arbitration of this matter; the disagreement lies in the timing of the arbitration—i.e. before or after the cycle change is implemented.

The initial legal issue raised is whether plaintiffs must demonstrate a likelihood of success in obtaining the award in aid of which the injunction is sought. Of course such a showing is a prerequisite to the issuance of injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure (*King v. Saddleback Junior College District*, 425 F.2d 426 (9th Cir. 1970)), but the law is unsettled as to the desirability of such a requirement in cases brought under Section 301. The resolution of this problem is tied to the cloudy relationship between Section 301 and Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. The tension between those seemingly conflicting provisions was noted and discussed in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), and a resolution of the problem was attempted. The *Sinclair* resolution was reconsidered in *Boys Markets v. Retail Clerks*, 398 U.S. 235 (1970), however, and was found to be deficient. In *Boys Markets* (at 254) the Court set forth principles to be considered by district courts in determining whether to grant injunctive relief in Section 301 cases.[3] The

3. Although *Boys Markets* arose in the context of management seeking to enjoin labor, the principles enunciated therein apply equally to cases like the instant one where labor seeks to enjoin management. See, e.g., Hoh v. Pepsico, Inc., 491 F.2d 556 (2d Cir. 1974).

quoted factors were first proposed by Mr. Justice Brennan in his dissent in *Sinclair*:

> "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect; and the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike. Beyond this, the District Court must, of course, consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." 370 U.S. at 228.

In *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974), the court opined that the *Boys Markets* adoption of the *Sinclair* dissent reference to the "ordinary principles of equity" indicated that the Supreme Court required a showing of some likelihood of success in Section 301 injunction cases. I see no reason to follow *Hoh* in a reading of *Boys Markets* which I feel goes against the spirit of that opinion. The Supreme Court in the *Steelworkers' Trilogy*, 363 U.S. 564, 574, 593 (1960) and in *Boys Markets* stressed the desirability of arbitration as a means of resolving labor disputes. See also, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). Referring matters to an arbitrator rather than thrusting such disputes on federal district courts offers

labor and management a forum before a person or a panel of persons intimately familiar with labor relations law and often with the particular industry—if not with the parties themselves—as well. Thus, courts have long deferred to the expertise of the arbitrator and the wisdom of the parties in choosing the arbitration process.[4]

To determine which party is likely to succeed on the merits from the mass of conflicting evidence adduced by affidavits and oral testimony in this case would, in effect, decide the case on the merits. The interpretation of Sections 43 and 100 of the Agreement—on which the parties are in total disagreement—is properly the function and the task of the arbitrator.

I am not unaware of the plight of management in the case of totally frivolous disputes by labor aimed solely at stalling a management program, and agree with Judge Friendly's statement in *Hoh* that:

> "[i]t would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitable was *plainly without merit.*" (Emphasis added.) Id. at 561.

The claim herein, however, is one which the parties agree is arbitable, and I find that it is clearly one which is not "plainly without merit".[5]

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4. This type of a situation differs from a suit under Section 301 of the Act directed at the enforcement of a collective bargaining agreement. See, e.g., *Hribar Trucking, Inc. v. Teamsters Chauf. & Help. Loc. No. 43,* 379 F.Supp. 993 (E.D. Wis. 1974).

5. The gist of the dispute over the interpretation of Section 43 revolves around the need for "written mutual consent" to the alteration of run schedules. I note that Greyhound executive Dale Stucker could not recall a single instance in the past fifteen years when a cycle change had been effectuated in the absence of such mutual consent.

Section 7 requires a district court to make specific findings prior to issuing injunctive relief. Several courts in addition to *Hoh* have held that *Boys Markets* did not invalidate the Section 7 findings requirement in Section 301 cases. *North American Coal Corp. v. Local Union 2262, U.M.W. of Am.,* 497 F.2d 459, 464 (6th Cir. 1974); *Detroit Newspaper Publishers Ass'n v. Detroit Typo. Union,* 471 F.2d 872, 875 (6th Cir. 1972), *cert. den.* 411 U.S. 967 (1973). Accordingly, a district court issuing injunctive relief must make findings that (1) the petitioning party will suffer more from the denial of the sought after relief than the responding party would suffer from its issuance; and (2) the threatened conduct by the defendant will cause irreparable injury to the plaintiff.

Although *Hoh* also held that a district court must follow the Section 7 requirement of hearing "the testimony of witnesses in open court" (491 F.2d at 560; *Railway Labor Exec. Ass'n. Bro. of Loc. Eng. v. Patton,* 500 F.2d 34, 36 (6th Cir. 1974)), I need not decide whether this is or should be the rule in all Section 301 injunction cases, because the conflicting affidavits filed in support of and in opposition to the injunction sought herein rendered it necessary to hear oral testimony on the irreparable injury and balance of harm issues.

The testimony elicited from union and management witnesses at the evidentiary hearing established that Greyhound will suffer some economic harm, the amount of which cannot now be determined, if it is enjoined from effectuating the cycle changes on June 25. Much of this loss of revenue will result from Greyhound's inability to achieve the savings in salary and fringe benefit payments that will be the end product of the cycle change. On the other hand, the parties have been operating under the present 6 on, 3 off

and 4 on, 3 off arangement in the Pacific Northwest since the early 1960's, and this scheduling has not worked an economic hardship on the company.

Much testimony was devoted to the question of whether any drivers would lose their jobs or be forced to move from their homes as a result of the cycle change. It established, despite plaintiffs' earlier predictions of doom, that no driver will suffer either of the above consequences pending arbitration. Members of Division 1384 will suffer considerable harm from the cycle changeover, however. Whether or not a driver will be able to retain a regularly scheduled route or will be relegated to the "extra board",[6] and whether or not the eight drivers who switched from regular routes to the extra board did so voluntarily, all drivers in Division 1384 who previously worked 6 on, 3 off and 4 on, 3 off cycles will have to work 5 on, 2 off cycles if the change is implemented. This is significant.

Eugene Gambrel, a 61 year-old driver with 33 years of Greyhound service, testified that he now puts in a 44-hour week on his 4 on, 3 off, Seattle to Portland run. His weekday evenings consist of a late dinner and an early bedtime in anticipation of the next day's draining schedule. The first day of his three-day respite is spent in pursuit of unwinding from the previous four and in an attempt to prepare himself to be fit enough to enjoy the next two days. If his cycle is changed to 5 on, 2 off, he will be compelled to work a 55-hour week. This, he contends, he will barely be able to do; but he will do it because he needs to maintain his salary level in order to take advantage of the company pension that awaits him four years hence. He will be compensated

6. Duties of extra board drivers include: replacing regular route drivers on the latters' scheduled days off, filling in for regular route drivers who are ill or are on vacation, and taking charter assignment when the occasion arises.

for this extra day of travail—in fact his salary may, as Greyhound points out, increase some 25%—but he maintains that the increase in compensation will not justify the increase in the expenditure of his energy. Plaintiffs, as the chosen representatives of all the drivers within Division 1384, similarly reject the additional salary because of an unwillingness to accept the additional work.

It may well be that Greyhound is entitled under the Agreement to change the work cycle and that Mr. Gambrel and others will have to work a 5 on, 2 off schedule. But that is the decision reserved for the arbitrator. Thus, I find that not enjoining Greyhound from implementing the schedule changes pending arbitration would harm plaintiffs much more than issuing the injunction would harm Greyhound.

The next question is whether the taking of 11 hours per week from the lives of plaintiffs' members—albeit a taking accompanied by just compensation—would result in irreparable injury to them. The precedents are sparse, but they reinforce my conclusion that the changeover here would cause irreparable injury. In *Letter Carriers, Branch 998 v. U.S. Postal Service*, 88 LRRM 3524 (M.D. Ga. 1975), irreparable injury was found in a situation much like the instant one. The court there noted that the elimination of existing postal routes and the consolidation of others would, of necessity, result in the disruption of the extant working schedules of the union members. In *International Brotherhood of Electrical Workers, Local 1245 v. Pacific Gas and Electric Company*, C-74-2537 (Dec. 6, 1974), Judge Harris of this Court enjoined the implementation of a plan to change the work week of certain of PG&E employees from Monday through Friday to Tuesday through Saturday. Finally, in the ultimate case, *Letter Carriers, Branch 352 v. U.S. Postal Service*, 88 LRRM 2678 (S.D. Iowa

1975), the court found that the elimination of a ten minute daily wash-up period constituted irreparable injury, and enjoined the Postal Service from eliminating it pending arbitration.

Finally, Greyhound contends that injunctive relief should be denied because the six weeks that elapsed between the time that plaintiffs received notice of the proposed change and the time this action was filed indicates that plaintiffs "failed to make every effort to settle [the] dispute either by negotiation or with the aid of • • • voluntary arbitration". 29 U.S.C. § 108. Regardless of whether Section 108 applies to Section 301 injunctions, an issue I do not reach, I find that plaintiffs did make sufficient efforts to settle this matter, first by suggestion and negotiation and then by a proposal for expedited arbitration (even though the Agreement had no such mechanism). This conduct is not comparable to that of the plaintiff unions in *Hoh v. Pepsico, Inc., supra.* There, despite some six weeks of notice before management's challenged action (a shutdown), the union failed to take any action even though an expedited arbitration process was available. The lawsuit was filed only two days before the implementation date. 491 F.2d at 558-559, 561-562.

Accordingly, I hereby enjoin Greyhound from implementing the proposed change in the present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement. This preliminary injunction shall issue upon plaintiffs giving security, approved by the Court or the Clerk of the Court, in the sum of ten thousand dollars ($10,000) for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction.

The above shall constitute the Court's Findings of Fact and Conclusions of Law in accordance with Rule 52 of the Federal Rules of Civil Procedure and 29 U.S.C. § 107.

Dated: June 20, 1975.

WILLIAM H. ORRICK, JR.
United States District Judge

Appendix B

United States Court of Appeals
for the Ninth Circuit

No. 75-2776

AMALGAMATED TRANSIT UNION, DIVISION 1384
and THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,
Plaintiffs and Appellees,
vs.

GREYHOUND LINES, INC., a corporation
Defendant and Appellant.

OPINION

[January 30, 1976]

Appeal from the United States District Court
for the Northern District of California

Before: HUFSTEDLER, KILKENNY and SNEED, Circuit Judges.

SNEED, Circuit Judge:

Appellant Greyhound Lines, Inc. (Greyhound) appeals the issuance of a preliminary injunction under § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, on behalf of the Amalgamated Transit Union, Division 1384, AFL-CIO, and the Amalgamated Council of Greyhound Divisions, AFL-CIO (Union). We affirm.

Greyhound notified the Union on April 17, 1975 that effective June 25, 1975 it planned to change the work cycles of bus drivers operating the Vancouver-Seattle and Seattle-Portland runs from their existing cycles of six days on, three days off, and four days on, three days off, respectively, to a straight weekly regimen of five days on and two days off. The Union objected, arguing that such a change could not be made unilaterally under the terms of the collective bargaining agreement (agreement). Greyhound responded that its action was authorized.[1] On May 22, 1975 the Union requested, in writing, immediate arbitration and maintenance of the status quo pending arbitration. Greyhound agreed to immediate arbitration but refused to refrain from making the scheduled changes pending arbitration. Rather than proceed to arbitration, the Union petitioned the federal district court to enjoin Greyhound from implementing the changes pending resolution of the matter through arbitration.

In its order granting the Union's petition for a preliminary injunction the district court indicated that to obtain a preliminary injunction the Union was not required to make

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1. The dispute concerns the interpretation of the following sections of the agreement:

> § 43. RUN SET UPS—Insofar as possible, regular runs will be assigned five (5) days per week or ten (10) days in fourteen (14) days. This section can be modified to conform to local conditions upon written mutual consent by the Union and the Company.
>
> • • • •
>
> § 100. EXISTING COMPANY RULES—It is agreed that all existing rules and regulations relating to the operation and conduct of Company's business not in conflict with provisions of this Agreement shall remain in effect until superseded or changed by subsequent rules and regulations not in conflict with this Agreement. The Company agrees that they will not change any rule or regulation that affects the employees beneficially without mutual agreement.

"a showing of some likelihood of success", as suggested in *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The court found the proper standard to be that the Union show that the position it would assert in arbitration was not "plainly without merit". Both of these "standards" are phrases found in the same paragraph of the opinion in *Hoh v. Pepsico, Inc., supra.*[2] The district court held that the Union's position which it would assert in arbitration was "not plainly without merit." Moreover, it found that a denial of the preliminary injunction would harm the Union more than Greyhound would suffer from its being granted, and that Greyhound's work cycle changes would cause irreparable injury to the Union and at least some of its members.

As a result of these findings of fact and conclusions of law the district court enjoined Greyhound from implementing the proposed changes pending a decision by arbitration and conditioned the issuance of the injunction upon the Union "giving security, approved by the Court or the

2. This paragraph of *Hoh* reads as follows:
"Furthermore, the ordinary principles of equity referred to as a guide in the portion of the Sinclair dissent that was approved in *Boys Markets* include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2 Cir. 1953). We think this must mean not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. Although courts have been directed by the Steelworkers' Trilogy, 363 U.S. 564, 574, 593, 80 S.Ct. 1343, 1347, 1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit." 491 F.2d at 561.

Clerk of the Court, in the sum of ten thousand dollars ($10,000) for payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction."

Greyhound moved to increase the amount of the bond, to require it to cover attorneys fees, and to require that the bond be conditioned so that payment on it would be called for upon an arbitration award in favor of Greyhound. The lower court raised the bond to $15,000 but denied Greyhound's motion in all other respects.

Greyhound makes the following arguments in this appeal: (1) the proper showing for the issuance of a preliminary injunction pursuant to § 301 of the LMRA is a "reasonable likelihood of success", not a showing that a claim is not "plainly without merit"; (2) having to work a five day week for compensation is, contrary to the lower court's finding, not irreparable injury; (3) regardless of the merits of the issuance of the injunction, the amount of the bond set was inadequate; (4) the bond should have been conditioned to call for payment on the Union's losing on the merits before the arbitrator; (5) the bond should have covered attorneys fees incurred by Greyhound in defending against the injunction as provided in § 7 of the Norris LaGuardia Act,[3] 29 U.S.C. § 107.

3. Section 7 provides in pertinent part:
No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

I.

Showing Necessary For A Section 301 Injunction.

In *Boys Market Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970) the Supreme Court recognized that, notwithstanding the anti-injunction provisions of the Norris La Guardia Act,[4] 29 U.S.C. 101 et seq., injunctive relief under section 301 of the Labor Management Relations Act[5] is available when (1) the collective bargaining agreement contains a mandatory arbitration clause, (2) the underlying dispute is arbitrable, (3) the party seeking the injunction is ready and willing to arbitrate, and (4) injunctive relief is warranted under ordinary principles of equity.[6]

Greyhound's initial contention is that under the circumstances of this case injunctive relief is *not* warranted under the ordinary principles of equity. It admits that in all other respects the conditions established in *Boys Market*

4. Section 4 of the Norris LaGuardia Act provides in part:
No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
• • • •

5. Section 301 of the LMRA (29 U.S.C. § 185(a)) provides:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount of the controversy or without regard to the citizenship of the parties.

6. *See generally*, Note, *Federal Labor Policy and the Scope of the Prerequisites for a Boys Market Injunction*, 19 St. Louis L.J. 328 (1975).

have been met. More particularly, Greyhound argues the ordinary principles of equity require that the Union establish that there is a "reasonable likelihood of success" in having its position in the arbitration proceedings accepted by the arbitrator. Presumably Greyhound's position is derived from those authorities which hold that the issuance of a preliminary injunction in an ordinary case requires a showing by the party seeking relief that there is a reasonable probability that he ultimately will prevail on the merits. *See* 7 Moore's Fed. Practice ¶65.04[1]. Rule 65, Fed. R. Civ. P., normally embraces such a requirement.

The district court was correct in rejecting this contention by Greyhound. The *Steelworkers' Trilogy*, 363 U.S. 564, 574, 593 (1960), and *Boys Market*, by emphasizing the importance of arbitration to stable labor-management relations, indicate that an effort to obtain a preliminary injunction to compel arbitration stands on a somewhat different footing than does an effort to secure an injunction in the ordinary case. The importance of arbitration justifies a partial lowering of the barrier to obtaining the injunction.[7]

The *extent* to which the barrier should be lowered in a case involving an effort to obtain a preliminary injunction to maintain the status quo pending arbitration is a difficult matter. The district court appears to have believed that a standard of "some likelihood of success", as that phrase was used in the paragraph of *Hoh* set forth in the margin,[8] is

7. Adjustments of the barrier have occurred in other settings. *See, e.g.*, Carter-Wallace, Inc. v. Davis-Edwards Pharmacal Corp., 443 F.2d 867, 871 (2d Cir. 1971) (injunction pendente lite in patent suit unavailable except when patent is beyond question valid and infringed).

8. *See* note 2, *supra*.

higher than the standard "plainly without merit" also appearing in the quoted paragraph. That Judge Friendly, the author of the paragraph, intended barriers of different height is by no means clear. A reasonable interpretation is that "plainly without merit" is the negative form of a standard, the affirmative form of which is "some likelihood of success". Under this view Judge Friendly was merely illustrating the standard "some likelihood of success" when he described the inequity of issuing preliminary injunctions pending arbitration when the petitioner's claims in arbitration were "plainly without merit."

In our view it is not necessary for us to resolve this dispute about what Judge Friendly meant. We hold that a plaintiff, without regard to whether he is the employer or the union, seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Market,* need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor. If there is a genuine dispute with respect to an arbitrable issue, the barrier we believe appropriate has been cleared.

Although the standard "not plainly without merit" employed by the district court differs in focus from that which we have enunciated, our review of the record convinces us that in this case arbitration will not be a futile endeavor and that a genuine dispute with respect to an arbitrable issue exists. Moreover, we are mindful that the issuance of a preliminary injunction inescapably involves the exercise of discretion by the trial court and should not lightly be disturbed on appeal. *See* 7 Moore's Fed. Practice, ¶ 65.04 [2], 65-49.

II.

Irreparable Injury.

It is obvious that a lowering of the barrier regarding the showing that a plaintiff must make with respect to the merits of the controversy serves to increase the intensity of disputes between the plaintiff and defendant regarding the scope of the injury that either granting the injunction will impose on the defendant or denying it will thrust upon the plaintiff. This increased intensity provides a strong reason why we embrace the position that section 7 of the Norris LaGuardia Act, insofar as it precludes the issuance of a temporary or permanent injunction "except after hearing the testimony of witnesses in open court", is applicable to proceedings to obtain preliminary injunctions pursuant to section 301 of the Labor-Management Relations Act. In this we join an impressive array of authorities. *See Hoh v. Pepsico, Inc.,* 491 F.2d 557 (2d Cir. 1974); *United States Steel Corp. v. United Mine Workers of America,* 456 F.2d 483 (3d Cir. 1972); *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union,* 471 F.2d 872, 876 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973); *Emery Air Freight Corp. v. Local Union 295,* 449 F.2d 586, 588-89 (2d Cir. 1971), *cert. denied,* 405 U.S. 1066 (1972). We recognize, of course, that there may be circumstances where the undisputed facts so clearly indicate that injunctive relief is necessary that "hearing the testimony of witnesses in open court" would be useless. Such circumstances did not exist in this case and probably will exist only infrequently. It follows that the trial court acted properly in conducting a hearing in which the testimony of witnesses was received in open court.

We also hold, and for like reasons, that the requirement of section 7 of Norris LaGuardia that there be a finding of fact "that as to each item of relief granted greater injury will be inflicted upon the complainant by the denial of relief than will be inflicted upon defendants by the granting of relief" is applicable to efforts to obtain a *Boys Market* injunction pursuant to section 301 of the LMRA. Quite properly the district court recognized this obligation and made such findings. We cannot say that its finding "that not enjoining Greyhound from implementing the schedule changes pending arbitration would harm plaintiffs much more than issuing the injunction would harm Greyhound" is clearly erroneous.

It is, of course, also necessary that a plaintiff show that the denial of the preliminary injunction will cause irreparable injury to him. *See Boys Market Inc. v. Retail Clerks Union Local 770, supra* at 254; *cf.* Norris LaGuardia Act, section 7(b), 29 U.S.C. § 107. The district court in this case made such a finding and, although we adjure trial courts not to treat inconvenience to a few union members as the irreparable injury required by ordinary principles of equity, we are not prepared to say that this finding is clearly erroneous, or that the issuance of the preliminary injunction was an abuse of discretion. Our reminder to treat "irreparable injury" as a meaningful requirement springs from our awareness that eliminating any requirement to show probable success in the arbitration proceedings increases accessibility to preliminary injunctions and, in the type of case here before us, further limits the opportunity of the employer to make changes in work rules pending arbitration. Maintenance of the status quo in all cases pending arbitration may be bargained for by the union and agreed to by the employer. Its equivalent should not be

derived from *Boys Market*. Treating irreparable injury as a significant requirement, even when the union is the plaintiff seeking the injunction, will tend to preclude this result.

III.

The Conditions of the Bond.

Greyhound's contention that the bond should have been conditioned to call for payment on the Union's losing on the merits before the arbitration is not supported by authority. Surety bonds required by reason of Rule 65(c), FED. R. CIV. P., are conditioned on "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." This means what it says. As Moore puts it, "Recoverable damages under the bond are those that are directly attributable to the restraining order or injunction, as the case may be, and which are incurred or suffered by a party as a result of the wrongful restraint, and does not include damages occasioned by the suit independently of an injunction granted therein." 7 MOORE'S FED. PRACTICE, ¶ 65.10[1], 65-96, 97. Wright and Miller are in accord. 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2973 (1973).

The pertinent language of section 7(e) of the Norris LaGuardia Act is not significantly different from that of Rule 65(c). It provides that the amount of the bond shall be sufficient "to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such an order or injunction." We agree with the court in *United States Steel Corporation v. United Mine Workers of America, supra* at 488, when it held that the bond in a *Boys Market* proceeding was payable "only if the preliminary injunction is found to have been improv-

idently or erroneously issued, that is, where the court did not hold a proper hearing or failed to make the factual determination mandated by Part V of the *Boys Market* opinion, or where the court erroneously issued a preliminary injunction over a labor dispute not covered by the contract grievance-arbitration provision." To accept Greyhound's contention that the bond should be payable in the event it wins the arbitration would fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Market* preliminary injunction.

We, however, do believe that Greyhound is correct in asserting that the bond could embrace reasonable attorneys fees as a part of the costs secured. Such fees are permitted under section 7(e) of the Norris LaGuardia Act and also were permitted by the court in *United States Steel Corporation v. United Mine Workers of America, supra* at 488, at the request of the union in a *Boys Market* proceeding. The union suggests that *Mine Workers* be read to limit inclusion of reasonable attorneys fees to instances in which a union is being enjoined. Although it is well-known history that the Norris LaGuardia Act was enacted to protect labor from anti-labor courts, we decline to use that history to justify an unevenhanded treatment of reasonable attorneys fees incurred in defending against an erroneous issuance of a preliminary injunction.

Nonetheless, having held that the preliminary injunction was properly issued the failure of the bond to include reasonable attorneys fees in this case imposed no injury or hardship on Greyhound.

AFFIRMED.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-1584

GREYHOUND LINES, INC.,
Petitioner,

vs.

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO,
and
THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is neither officially nor unofficially reported and is attached to the Petition as Appendix A, pp. 1-11 (hereinafter "Appendix A"). The opinion of the Court of Appeals is attached

to the Petition as Appendix B, pp. 12-22 (hereinafter "Appendix B"), and is also reported at 529 F.2d 1073.

JURISDICTION

The jurisdictional requisite is adequately set forth in the Petition on page 2.

QUESTIONS PRESENTED

The Petition seeks review of a judgment, by the United States Court of Appeals for the Ninth Circuit, which affirmed the issuance of a preliminary injunction. Prior to the filing of the Petition, the injunction terminated. The threshold question presented is:

> When a Petition seeks review of an injunction which has already terminated prior to the filing of the Petition, should this Court refuse to issue a Writ of Certiorari because no actual case or controversy exists and the matter is moot?

The injunction was sought by a labor union to prevent the irreparable harm that would occur if an employer unilaterally changed certain working conditions which had been in effect for fifteen (15) years pursuant to an agreement between the parties. The union had requested the employer to submit the dispute to expedited arbitration and to preserve the status quo pending the arbitrator's decision. When the employer

refused those requests, the union filed an action, pursuant to section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. section 185. After a hearing at which both parties presented witnesses and evidence, the District Court, pursuant to *Boys Markets, Inc. v. Retail Clerks Union,* 398 U.S. 235 (1970), issued a preliminary injunction to preserve the status quo pending arbitration. A panel of the Ninth Circuit unanimously affirmed. The other questions raised by the Petition are:

1. Was the issuance of a preliminary injunction by the District Court proper because it promoted the strong Congressional policy in favor of arbitrating labor-management disputes?

2. In ruling on the application for injunctive relief, the District Court refused to speculate as to which party was more likely to prevail on the merits *at arbitration.* The Court held that such speculation would constitute an improper judicial intrusion into the domain of the arbitrator. Was the District Court correct in its refusal to rule on the merits of an arbitrable dispute?

3. The District Court refused to require payment on the injunction bond if the employer won on the merits before the arbitrator. Instead, the Court conditioned payment, pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, on a subsequent showing that the employer had been "wrongfully restrained." Was it proper for the Court to condition the bond in the manner specified by the rule?

STATUTES INVOLVED

The pertinent statutes are set forth in the Petition on page 4.

STATEMENT OF THE CASE

I. The Parties.

The Petitioner in this case is Greyhound Lines, Inc. ("Greyhound" or the "Company"). It is a national corporation and an employer in an industry affecting commerce within the meaning of sections 2(2) and 2(7) of the National Labor Relations Act, as amended (the "Act"), 29 U.S.C. sections 152(2), (7).

The Respondents are Amalgamated Transit Union, Division 1384, AFL-CIO, which represents Greyhound bus drivers in the Vancouver-Portland area, and the Amalgamated Council of Greyhound Divisions, AFL-CIO, which is comprised of numerous locals, including Division 1384, and represents all Greyhound drivers. Division 1384 and the Council are both labor organizations within the meaning of section 2(5) of the Act, 29 U.S.C. section 152(5), and are referred to collectively in this Brief as the "Union."

II. The Labor Dispute.

Since 1960, Greyhound bus drivers working on runs between Vancouver and Seattle, and between Seattle and Portland, had weekly work cycles, respectively, of six days on, three days off, and four days on, three days off. Unexpectedly, in April 1975, at a meeting

held to discuss other matters, Greyhound mentioned to the Union that it intended to change those work cycles to five days on, two days off.

Soon after the Union learned of this plan, it sent a letter to the Company contesting its right to change the work cycle unilaterally. It was the Union's position that the cycles in question had been in effect for fifteen (15) years pursuant to an agreement between the parties, and that the type of change being contemplated had never before been unilaterally made by Greyhound.

After the Union's initial letter of protest, additional correspondence passed between the parties and, on May 20, 1975, Greyhound posted new runs based on the proposed work cycles. The runs were scheduled to go into effect on June 25, 1975.

Two days after the runs were posted, the Union, both orally and in writing, requested that the dispute be arbitrated in an expedited manner. The Union believed that an expedited process was desirable because the grievance procedure normally requires: (1) the filing of a grievance and consideration of it at the local level; (2) a "presidential hearing"; (3) two-party arbitration; and (4) three-party arbitration. While it can easily take three (3) months just to reach the final step, the new work cycles were scheduled to go into effect in approximately one (1) month.

In return for its willingness to expedite the arbitration, the Union asked Greyhound to refrain from implementing the proposed work cycle changes until an

arbitrator ruled on their propriety. The reason for requesting maintenance of the status quo was that even an expedited arbitration would take some time and, if the changes were implemented before the arbitrator rendered his decision, the Company's drivers would suffer irreparable harm. This harm would result from the loss of jobs and earnings for some operators, and from an increase of nine (9) to ten (10) hours a week for other drivers, bringing their total workweek, in many cases, to fifty-five (55) hours and greatly increasing the stress and pressure under which they worked.

Despite the fact that the Company had been considering a change in the work cycle for a year or two, it refused to delay implementation of the change until an arbitrator could consider the dispute. The Company offered no reason why the proposed changes had to be implemented immediately and could not be postponed for a reasonable period while expedited arbitration took place. Instead, Greyhound's refusal to preserve the status quo was grounded simply on its assertion that "the company acts and [the Union] reacts." And adding insult to injury, Greyhound also refused to agree to expedited arbitration.

Faced with these refusals, and the irreparable harm its members would suffer if the work cycles were changed pending arbitration, the Union filed an action in the United States District Court for the Northern District of California, to preserve the status quo until an arbitrator could resolve the contractual dispute.

III. The Legal Proceedings Below.

On June 17, 1975, an evidentiary hearing was held before the District Court on the Union's application for a preliminary injunction. At the outset of the hearing, the Court rejected Greyhound's suggestion that it speculate as to which party was more likely to prevail on the merits of the dispute at arbitration. The Court found that "to determine which party is likely to succeed on the merits . . . would, in effect, decide the case on the merits" (Appendix A, p. 6) and, thereby, deprive the arbitrator of the role the parties had assigned to him. Accordingly, no evidence concerning the merits of the dispute was received by the Court at the hearing.

On June 19, 1975, the case was argued to the Court, and the following day an order was issued granting a preliminary injunction which prohibited Greyhound from "implementing the proposed change in the present weekly work cycle of affected employees represented by plaintiffs pending a decision by arbitration under the Agreement." (Appendix A, p. 10.) The Court issued the injunction because it found that: (1) without going into the merits, it was evident that the Union's position was not frivolous (Appendix A, p. 6); (2) not enjoining Greyhound from implementing the scheduled changes pending arbitration would harm the Union much more than issuing the injunction would harm the Company (Appendix A, p. 9); and (3) the Union would suffer irreparable harm unless the injunction were issued. (Appendix A, p. 9.)

The injunction was conditioned on the Union's filing a bond in the sum of $10,000.00. As is customary, the bond was to cover the "payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained by this preliminary injunction." (Appendix A, p. 10.) Greyhound subsequently moved for an order to increase the amount of the bond; to have the bond cover attorney's fees; and to require that the bond be made payable not only on a finding that the Company was wrongfully enjoined, but also upon a ruling by the arbitrator in favor of Greyhound. These issues were briefed by the parties and argued to the Court on June 27, 1975. Three days later, the Court raised the amount of the bond to $15,000.00, but denied the Company's other requests.

Greyhound then appealed to the United States Court of Appeals for the Ninth Circuit, which unanimously affirmed the issuance of the injunction. The Ninth Circuit relied on this Court's decision in *Boys Markets, Inc. v. Retail Clerk's Union Local 770, supra,* which recognized that, notwithstanding the anti-injunction provisions of the Norris-LaGuardia Act, injunctive relief is available under 29 U.S.C. section 185 when: (1) a collective bargaining agreement contains a mandatory arbitration clause; (2) the underlying dispute is arbitrable; (3) the party seeking the injunction is ready and willing to arbitrate; and (4) injunctive relief is warranted under ordinary principles of equity.

There was no dispute that the first three conditions were met in the present case. As to the fourth condition, the Court of Appeals found that this Court's rulings in the *Steelworker's Trilogy,* 363 U.S. 564, 574, 593 (1960), and in *Boys Markets,* stressed the importance of arbitration in the labor field, and indicated that an effort to obtain a preliminary injunction in that context stands on a somewhat different footing than does an effort to secure such relief in the ordinary case. (Appendix B, p. 17.) To require a party to demonstrate that it is more likely to succeed on the merits, would involve an intrusion by the judiciary into the arbitration process. Accordingly, the Ninth Circuit agreed with Judge Friendly of the Second Circuit (*Hoh v. Pepsico, Inc.,* 491 F.2d 556 (1974)), that, in cases where an employer or union seeks injunctive relief in a labor arbitration context, the moving party is entitled to such relief if it establishes that "the position [it] will espouse in arbitration is sufficiently sound to prevent arbitration from being a futile endeavor." (Appendix B, p. 18.) The Court of Appeals found that a genuine dispute existed in the present case regarding an arbitrable issue and, accordingly, the issuance of a preliminary injunction was proper.

The Ninth Circuit also rejected Greyhound's contention that the injunction bond should have required payment if the Union lost on the merits before an arbitrator. Following the language of Rule 65(c) of the Federal Rules of Civil Procedure, section 7(e) of the Norris-LaGuardia Act, and the decision of the

Third Circuit in *United State Steel Corp. v. United Mine Workers of America,* 456 F.2d 483 (1972), the Court held that the bond was properly conditioned upon a subsequent finding that Greyhound had been wrongfully enjoined or restrained by the preliminary injunction. "To accept Geryhound's contention that the bond should be payable in the event it wins the arbitration would fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Markets preliminary injunction.*" (Appendix B, p. 22.)[1]

On December 3-4, 1975, an arbitration was held of the underlying dispute between the parties. A decision was rendered by the arbitrator on April 7, 1976, and, by its own terms, the preliminary injunction terminated as of that date. Greyhound's Petition for a Writ of Certiorari was filed after the injunction had expired.

ARGUMENT

Basically, Greyhound advances two principal reasons why its Petition should be granted. First, the Company attempts to create the impression that the injunction issued by the District Court was an extraordinary intrusion by the federal judiciary into the process of labor arbitration and, even if this intrusion were proper, the lower courts need guidance in such

[1]The Court of Appeals also affirmed the District Court's finding of irreparable harm, but reversed on the issue of attorney's fees and held that the bond should cover such expenses. Neither the issue of irreparable harm, nor the issue of attorney's fees, is before this Court.

cases. In fact, however, no extraordinary intrusion occurred. Decisions by this Court, going back nearly twenty (20) years, clearly establish the power and propriety of judicial action when necessary to further the strong Congressional policy in favor of labor arbitration. The type of injunction involved in this case is common and has been issued by federal district courts for over a decade. In fact, this very Petitioner has been enjoined at least three times to preserve the status quo pending arbitration—the first such injunction having been issued thirteen years ago. See *Local 1098 v. Eastern Greyhound Lines,* 225 F.Supp. 28 (D. D.C. 1963); *Amalgamated Transit Union v. Greyhound Lines* (N.D. Calif., Docket No. C-72-2306, February 3, 1973).

Thus, the injunction issued in the present case was not an extraordinary new development in the labor law field, and the district courts have already received ample guidance from this Court regarding the grounds for issuing such equitable relief. That guidance was provided in *Boys Markets,* where, despite the provisions of the Norris-LaGuardia Act, this Court affirmed the power of the federal courts to issue injunctions when necessary to preserve the status quo pending arbitration.

The second major ground advanced by Petitioner in support of its Petition is that the decision of the Ninth Circuit conflicts with decisions of two other Circuits. In fact, however, there is no such conflict. Thus, no important question of law, or conflict between Circuits, exists which warrants the granting of the Petition.

Moreover, the Petition should be denied because the case is moot.

I. THIS CASE IS MOOT.

It is clearly established that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). This inability of the federal judiciary to review "moot" cases derives from the requirement of Article III of the Constitution, which conditions the exercise of judicial power on the existence of a "case or controversy." *Liner v. Jafco, Inc.,* 375 U.S. 301 (1964). Therefore, for this Court to render a decision, there must be an actual controversy at the stage of appellate or certiorari review, and not simply at the date the action was initiated. See, e.g., *SEC v. Medical Committee for Human Rights,* 404 U.S. 403 (1972); *United States v. Munsingwear,* 340 U.S. 36 (1950).

In *DeFunis v. Odegaard,* 416 U.S. 312 (1974), this Court held that a challenge to the admissions policy of a law school was moot because the student bringing the action was about to graduate. The present case presents an even clearer case of mootness. While the Petition in *DeFunis* was filed at a time when an actual case or controversy still existed, that is not true in the current case. Greyhound's Petition was not filed until after the arbitration award had been rendered. (Petition, p. 9.) Since the injunction being challenged by the Company only remained in effect "pending a decision by arbitration," that injunction had ceased to exist, by its own terms, at the time the Petition was filed. Thus, no actual case or controversy existed between the parties when the Petition was filed and, accordingly, the Petition should be denied because the matter is moot. Cf., *Glen-Arden Commodities, Inc. v. Costantino,* 493 F.2d 1027, 1030 (2d Cir. 1974); *Benz v. Compania Naviera Hildalgo, S.A.,* 205 F.2d 944, 946 (9th Cir.), cert. denied, 346 U.S. 885 (1953); *Benitez v. Anciani,* 127 F.2d 121, 125 (1st Cir. 1942), cert. denied, 317 U.S. 699 (1943); *Southard & Co. v. Salinger,* 117 F.2d 194 (7th Cir. 1941).

II. THE ISSUANCE OF A PRELIMINARY INJUNCTION BY THE DISTRICT COURT WAS NECESSARY AND PROPER TO EFFECTUATE THE STRONG CONGRESSIONAL POLICY IN FAVOR OF LABOR ARBITRATION.

As previously noted, Petitioner attempts to create the impression that the injunction issued in this case was an unprecedented intrusion by the federal judiciary into the process of labor arbitration. In actuality, the injunction was neither unprecedented nor an intrution. It was not unprecedented because many other courts have issued injunctions in similar circumstances. It was not an intrusion because the District Court carefully avoided the merits of the arbitrable conflict and simply preserved the status quo until an arbitrator could resolve the dispute. But in order to fully understand why the preliminary injunction issued in this case was not an unprecedented judicial intrusion, an historic overview is necessary.

Prior to 1932, the federal courts had frequently abused their equitable powers by issuing *ex parte* restraining orders against labor union activities. See generally, F. Frankfurter & N. Greene, *The Labor Injunction* (1930); *Boys Markets v. Retail Clerks Union, supra,* 398 U.S. at 250. In response to this situation, Congress in 1932 passed the Norris-LaGuardia Act (29 U.S.C. sections 101-15) "to correct the abuses that had resulted from the interjection of the Federal judiciary into union-management disputes on behalf of management." *Boys Markets, supra,* 398 U.S. at 251. Norris-LaGuardia did not, however, create an absolute prohibition against federal injunctions. (See 29 U.S.C. sections 107-109.) Rather, section 4 (29 U.S.C. section 104) deprived the federal courts of jurisdiction to enjoin certain specified acts, including strikes, which involved, or grew out of, any labor dispute.

In *Brotherhood of R.R. Trainmen v. Chicago River and Indiana R.R. Co.,* 353 U.S. 30 (1957), this Court made it clear, however, that even the seemingly absolute prohibition in Norris-LaGuardia against enjoining strikes did not prevent the federal courts from issuing injunctions against walkouts when such equitable relief was necessary to further the Congressional policy in favor of the system of arbitration established by the Railway Labor Act. And, in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.,* 363 U.S. 528 (1960), this Court held that such an injunction could be conditioned on the employer's restoring the status quo pending resolution of the dispute by arbitration. The Court decided that it was proper

to condition the injunction in that manner because the condition was designed to prevent "injury so irreparable that a decision by the Board in the union's favor would be but an empty victory." 363 U.S. at 534.

The *Locomotive Engineers'* decision left open the question of whether, during the pendency of a railroad dispute, a district court could order the employer to preserve the status quo independently of any suit for injunctive relief by the employer. 363 U.S. at 531 n. 3. That question was answered in the affirmative by the Second Circuit in *Westchester Lodge 2186 v. Railway Express Agency, Inc.,* 329 F.2d 748 (2d Cir. 1964). The Court of Appeals ruled that the district court had the broad equitable power to issue injunctions to preserve the status quo if such relief were necessary to effectuate the purposes and policies of the Railway Labor Act. Nothing in the Norris-LaGuardia Act prevented such an injunction against an employer. 329 F.2d at 752-53. Accord, *Local Lodge 2144 v. Railway Express Agency, Inc.,* 409 F.2d 312 (2d Cir. 1969).[2]

The judicial policy of granting equitable relief when necessary to effectuate our national labor policy in favor of arbitration is not restricted to cases arising

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[2]More recently, in *Chicago and Northwestern Ry. Co. v. United Transportation Union,* 402 U.S. 570 (1971), this Court again affirmed that labor policies, which Congress has deemed important, may be enforced by injunction, despite the seemingly absolute prohibition of Norris-LaGuardia. In that case, the basis for seeking injunctive relief was not that a dispute was pending arbitration, but rather that the union had failed to make every reasonable effort to reach an agreement. 45 U.S.C. section 152 First. This Court held that the Norris-LaGuardia Act does not bar the issuance of an injunction against a union in those circumstances because injunctive relief is the only practical and effective means of enforcing an important policy of the Railway Labor Act. 402 U.S. at 583.

under the Railway Labor Act; rather, a similar and parallel practice has developed in cases brought pursuant to section 301 of the Labor-Management Relations Act. Beginning with the so-called *Steelworkers Trilogy, supra,* this Court has taken cognizance of, and emphasized, the importance that Congress, through the National Labor Relations Act, has attached to promoting "the peaceful settlement of labor disputes through arbitration." *Boys Markets, supra,* 398 U.S. at 241.

In *Textile Workers v. Lincoln Mills,* 353 U.S. 448 (1957), the Court considered the question of whether the Norris-LaGuardia Act withdrew from the federal courts to power to compel specific performance of the arbitration provisions contained in a collective bargaining agreement. The Court found that, while a literal reading of the Act might lead one to that conclusion, "the failure to arbitrate was not a part and parcel of the abuses against which the act was aimed." 353 U.S. at 458. Therefore, the Court ruled, an order compelling arbitration is not prohibited by section 4 of the Norris-LaGuardia Act.

The question of whether Norris-LaGuardia prohibits the federal courts from enjoining a strike in violation of a no-strike provision in a collective bargaining agreement was not finally resolved until thirteen years after the *Lincoln Mills* decision. This Court first ruled in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), that the courts had no jurisdiction to issue such injunctions. The *Sinclair* decision was overruled eight years later in *Boys Markets, supra.* The Court found that the *Sinclair* decision had not furthered, but rather

had frustrated, an important goal of the national labor policy—the peaceful settlement of disputes through arbitration. 398 U.S. at 241.

> "[T]he very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes without resort to strikes, lockouts, *or other self-help measures.* This basic purpose is largely undercut if there is no immediate, effective remedy for these very tactics that arbitration is designed to obviate." 398 U.S. at 242. [Emphasis added.]

Thus, there is a body of law by this Court, going back nearly twenty (20) years, which clearly establishes the power and propriety of judicial intervention when necessary to further the strong Congressional policy in favor of arbitrating labor disputes. And the logical corollary to the *Boys Markets* decision is that federal courts may also issue injunctions against employers to preserve the status quo pending arbitration.[3] Pursuant to *Boys Markets,* strikes may be enjoined because, unless injunctions are available, there is no effective remedy for preventing the very work stoppages that the Congressional policy in favor of arbitration is designed to eliminate. Similarly, unless employers may be enjoined from engaging in "self-help" by implementing certain work changes prior to arbitration, the national policy in favor of peaceful resolution of disputes will also be threatened. Em-

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[3]Such injunctions—unlike those against strikes—are not prohibited by any language in section 4 of the Norris-LaGuardia Act. See *Lodge 2186, supra,* 329 F.2d at 753; *Bateman v. South Carolina State Ports Authority,* 298 F.Supp. 999 (D. S.C. 1969).

ployees will be less willing to surrender their right to strike during the term of a collective bargaining agreement if there are not restraints on the employer's ability to engage in self-help pending arbitration.

Stating that employers can be enjoined to preserve the status quo prior to arbitration is not to state, however, that unions can prevent an employer from taking action whenever it does something that is arguably arbitrable, and which the union does not like. As this Court made clear in *Boys Markets,* not every strike involving an arbitrable issue may be enjoined. 398 U.S. at 253-54. Rather, an injunction will issue only if it can be shown that the strike has caused, or will cause, irreparable harm, and that the employer will suffer more from the denial of the injunction than the union will suffer from its issuance. See *Gateway Coal Co. v. United Mine Workers,* 414 U.S. 368, 387 (1974). Similarly, an employer may be enjoined to preserve the status quo pending arbitration only if it can be shown that the changes it is attempting to implement have caused, or will cause, irreparable harm, and that the union or its members will suffer more from the denial of the injunction than the employer will suffer from its issuance.

Using these standards, District Courts throughout the country have issued injunctions against employers to preserve the status quo pending arbitration. See, e.g., *Letter Carriers, Branch 998 v. U.S. Postal Service,* 88 LRRM 3524 (M.D. Ga. 1975); *Letter Carriers, Branch 352 v. U.S. Postal Service,* 88 LRRM 2678 (S.D. La. 1975); *I.B.E.W. Local 1245 v. P. G. & E.*

(N.D. Calif., Docket No. C-74-2537, December 6, 1974); *Amalgamated Transit Union v. Greyhound Lines* (N.D. Calif., Docket No. C-72-2306, February 3, 1973); *Local 757 v. Budd Co.,* 345 F.Supp. 42 (E.D. Pa. 1972); *Local 294 v. Three Rivers Industries,* 78 LRRM 2090 (D. Mass. 1971); *I.U.E. v. Radio Corp. of America,* 77 LRRM 2201 (D. N.J. 1971); *United Steelworkers v. Blaw-Knox Foundry,* 319 F.Supp. 636 (W.D. Pa. 1970); *Teamsters Local 328 v. Armour,* 294 F.Supp. 168 (D. Mich. 1968); *Local 1098 v. Eastern Greyhound Lines,* 225 F.Supp. 28 (D. D.C. 1963).[4] As those courts have properly noted, an action to preserve the status quo pending arbitration is really an action, as in *Lincoln Mills,* to specifically enforce an arbitration clause. *Local 1098 v. Eastern Greyhound Lines, supra,* 225 F.Supp, at 31. As one court aptly stated:

> "The . . . Company has in essence put the 'cart before the horse.' The Company has followed a course of conduct which seems to indicate that they will [act] first and worry about arbitration and the collective bargaining agreement later. That is not the policy of our national labor laws. The policy as set forth in the Steelworkers Trilogy is to encourage the peaceful settlement of labor disputes through arbitration. If the court has the power to order specific performance of a contract covenant to arbitrate, it has the collateral power

[4]None of the district court cases cited above has been reviewed by a Court of Appeals. Two Circuits, however, in circumstances somewhat different than those in the present case, have recognized and exercised their power to grant injunctions on behalf of unions to preserve the status quo pending arbitration. See *Pressman's Union No. 9 v. Pittsburgh Press Co.,* 479 F.2d 607, 609 n. 1 (3d Cir. 1973); *Milk Drivers Local 338 v. Dairymen's League Co-op Assoc., Inc.,* 304 F.2d 913 (2d Cir. 1962).

to take steps that would prevent rendering the result of the arbitration futile and ineffective." *Local 757 v. Budd Co., supra,* 345 F.Supp. at 47.

Thus, Greyhound's attempt to portray the injunction in this case as an unprecedented judicial intrusion into the labor arbitration process is inaccurate. Nor is there any merit to the Company's claim that this case did not involve a "violation" of a labor contract which required judicial intervention in order to preserve the jurisdiction of the arbitrator and to allow the arbitration process to work.[5] The underlying dispute involved Greyhound's attempt to make certain unilateral changes, and the Union's contention that such action would *violate the collective bargaining agreement between the parties.* While that dispute was arbitrable under the agreement, had the proposed changes been implemented prior to arbitration, irreparable harm would have resulted.[6] Thus, even if the Union had

[5]Greyhound's argument that an injunction was improper in this case because it involved adding terms to the collective bargaining agreement (Petition, pp. 17-19), is really just another way of stating that there was no violation of the agreement. It should be noted that, in *Teamsters v. Lucas Flour Co.,* 369 U.S. 95 (1962), this Court held that, where a collective bargaining agreement contains a broad arbitration clause, a no-strike provision will be *implied* if the agreement does not contain one. In a section 301 suit to enjoin a strike in violation of such an implied provision, it is, of course, no defense that the no-strike provision has been "added on" to the contract, or that there is no "violation" of the express terms of the written agreement.

[6]The Company's contention that the arbitrator could have provided an adequate remedy (Petition, pp. 15-16) is really an argument that no irreparable harm was present. But Greyhound has not raised that issue as one for consideration by the Court. (Petition, pp. 2-3.) And in any event, the lower court's finding of irreparable harm is presumptively correct (see, e.g., *Shearman v. Missouri Pac. R.R. Co.,* 250 F.2d 191 (8th Cir. 1957)), and can be

ultimately won the arbitration, it would have been damaged since, by its very nature, irreparable harm produces injury for which no arbitrator could subsequently provide adequate compensation.

By agreeing to arbitration, Greyhound also agreed to refrain from action which would render that process meaningless. Its proposed unilateral changes, however, would have produced damages for which there was no adequate remedy, and, therefore, injunctive relief to preserve the status quo pending arbitration was necessary to prevent "injury so irreparable that a decision by the [arbitrator] in the union's favor would be but an empty victory." *Brotherhood of Locomotive Engineers, supra,* 363 U.S. at 534. Injunctive relief in such circumstances is essential in order to make the arbitration process a meaningful one and, thereby, to effectuate "the basic policy of national labor legislation [which is] to promote the arbitral process as a substitute for economic warfare." *Teamsters v. Lucas Flour, supra,* 369 U.S. at 105.[7]

reversed only if there is clear proof that it is an abuse of discretion or is "clearly erroneous." *Id.; Washington Capitols Basketball Club v. Barry,* 419 F.2d 472 (9th Cir. 1969); *Local Lodge 2144, supra,* 409 F.2d at 317; *Tatum v. Blackstock,* 319 F.2d 397 (5th Cir. 1963); *Property Devel. Corp. v. Mitchell,* 286 F.2d 222 (7th Cir. 1961); Moore's *Federal Practice* (hereinafter "Moore"), ¶65.04[2], pp. 65-48 to 65-49 (2d ed. 1974).

[7]Greyhound's claim (Petition, pp. 18-19) that the Court of Appeals' decision in this case conflicts with the holding of the Sixth Circuit in *Detroit News. Pub. Ass'n v. Detroit Typo. Union,* 471 F.2d 872 (1972), *cert. denied,* 411 U.S. 967 (1973), is unfounded. In the latter case, section 10(b) of the contract provided that, if there were a dispute over the interpretation or application of the agreement, all working conditions prevailing prior to the change out of which the dispute arose would remain in effect pending resolution of the grievance. The employer contended that the change in question was not covered by section 10(b) and the

III. THE DISTRICT COURT PROPERLY REFUSED TO SPECULATE AS TO WHICH PARTY WAS MORE LIKELY TO PREVAIL ON THE MERITS AT ARBITRATION, SINCE SUCH SPECULATION WOULD HAVE CONSTITUTED AN IMPROPER JUDICIAL INTRUSION INTO THE DOMAIN OF THE ARBITRATOR.

After first attempting to portray the District Court's injunction as an extraordinary and improper judicial intrusion into the arbitration process, Greyhound then does a complete about-face and argues that the District Court should have considered the *merits* of the underlying disputes and speculated as to which party was more likely to succeed *at arbitration.*[8] Consideration of the merits, and speculation as to success, however, is precisely the type of judicial intrusion which should not take place, because it would thrust the court into the role that the parties reserved for the arbitrator.

At the evidentiary hearing, the District Court refused to accept any testimony relating to the Union's likelihood of success before the arbitrator because:

union sought an injunction to preserve the status quo pending arbitration. The District Court granted the relief on the ground that the employer violated section 10(b). The Sixth Circuit properly held that the District Court should not have construed section 10(b) and thereby judged the merits of the case. The order granting the injunction was reversed because the District Court failed to weigh the equities and because there was no showing of irreparable harm. 471 F.2d at 875. The Sixth Circuit did not hold, or imply, that a union could not obtain an injunction to preserve the status quo pending arbitration.

[8]There is no merit to Greyhound's contention that the preliminary injunction was not intended to enforce the arbitration provisions of the agreement, but rather to grant the Union relief that only the arbitrator could award.(Petition, p. 20.) The injunction merely preserved the status quo until the arbitrator could act. The *denial* of injunctive relief would have permitted the Company to make changes that only an arbitrator could rule were proper.

> "To determine which party is likely to succeed on the merits from the mass of conflicting evidence adduced by affidavits and oral testimony in this case would, in effect, decide the case on the merits. The interpretation of . . . the Agreement—on which the parties are in total disagreement—is properly the function and task of the arbitrator." (Appendix A, p. 6.)

Before the Ninth Circuit, Greyhound contended that *Boys Markets* required the Union to show a "reasonable likelihood of success" at arbitration in order for an injunction to issue preserving the status quo pending that proceeding. The Court of Appeals rejected that contention because:

> "The *Steelworkers' Trilogy* . . . and *Boys Markets,* by emphasizing the importance of arbitration to stable labor-management relations, indicate that an effort to obtain a preliminary injunction to compel arbitration stands on a somewhat different footing than does an effort to secure an injunction in the ordinary case." (Appendix B, p. 17.)

The Ninth Circuit's ruling is correct precisely because it recognizes the very important differences between a section 301 suit involving arbitration, and other actions seeking injunctive relief. As the Court of Appeals properly noted, an understanding of those differences begins with the *Steelworkers' Trilogy.* In all three of those cases, this Court reversed the lower courts on the same basic ground—that, in section 301 actions involving arbitration, the courts are not to become involved in the merits of the dispute. The

parties have not bargained for a judicial determination of their differences, but rather have agreed that disputes will be heard and settled by an arbitrator.

> "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. 'A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .' [Citation omitted.]
>
> "The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in her [sic] personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed." *United Steelworks v. Warrior & Gulf Nav. Co., supra,* 363 U.S. at 581-82.

Because the parties have agreed to resolution of their disputes by an arbitrator, a court should not become involved in assessing the merits of their respective positions.

> "The question is not whether in the mind of the court there is equity in the claim." *United Steel Workers v. American Mfg. Co.,* 363 U.S. 564, 567 (1960).
>
> "The collective agreement requires arbitration of claims that courts might be unwilling to entertain. In the context of the plant or industry the grievance may assume proportions of which judges are ignorant." *Id.*
>
> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language which will support the claim." *Id.* at 568.

On the same day that the *Trilogy* was decided, this Court rendered its opinion in *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co., supra.* The Court of Appeals had reversed the conditioning of an anti-strike injunction on the employer's maintenance of the status quo because it believed that imposing such a condition constituted an actual or inherent decision on the merits. In reversing, this Court stated:

> "It is true that a District Court must make some examination of the nature of the dispute before conditioning relief since not all disputes . . . threaten irreparable injury . . . But this examination of the nature of the dispute is so unlike that which the [arbitration board] will make on the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the [arbitration board]." 363 U.S. at 533-34.

This Court made it clear that, in determining whether to preserve the status quo, it is not the District Court's "function to construe the contractual provisions upon which the parties relied for their respective positions on the merits." *Id.* at 533; *Detroit News. Pub. Ass'n. v. Detroit Typo. Union,* 471 F.2d 872, 875 (6th Cir. 1972), *cert. denied,* 411 U.S. 967 (1973).

The ruling by the Court of Appeals in this case is consistent with this teaching and does not conflict with the Second Circuit's opinion in *Hoh v. Pepsico, supra.* The Ninth Circuit held that in injunction was properly issued against Greyhound because the Union had established that

> "the position [it] will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." (Appendix B, p. 18.)

This is the correct test because it takes cognizance of the special nature of section 301 suits involving arbitration. The test strikes a proper balance between allowing District Courts to deny injunctive relief in frivolous cases, and preventing the Courts from having to assess the relative likelihood of success—an assessment which would thrust the Courts into the merits of the case and the role of the arbitrator.[9]

No conflict exists between this test and the one laid down in *Hoh.* The Second Circuit merely held that:

> "[T]he 'ordinary principles of equity' referred to as a guide in that portion of *Sinclair* which was approved in *Boys Markets* include some likelihood of success . . . . It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was *plainly without merit.*" 419 F.2d at 561. [Emphasis added.]

Thus, *Hoh* does not support Greyhound's position that the District Court should have determined which party was more likely to succeed on the merits at arbitration. *Hoh* simply requires that there be "some likelihood of success" in the sense that the underlying claim, by the party seeking injunctive relief, is not "plainly without merit." Or, to state the same test in the words of the Ninth Circuit, the claim must be one which is "sufficiently sound to prevent the arbitration from being a futile gesture."[10]

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[9]This same balance was struck by this Court in the *Steelworkers Trilogy,* where it was held than an order compelling arbitration must be granted "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." 363 U.S. at 582-83.

[10]There is no basis to Greyhound's contention that, if the decision of the Ninth Circuit stands, there will be no restraint on unions to seek injunctive relief whenever an employer takes some action the union does not like. Contrary to the Company's argument, injunctions will not be "easy to obtain because they can be obtained with impunity." (Petition, p. 10.) Under the Ninth Cir-

IV. THE DISTRICT COURT PROPERLY REFUSED TO CONDITION THE BOND UPON THE SUBSEQUENT RULING OF THE ARBITRATOR.

Upon issuing a preliminary injunction, the District Court required the Union to post a $15,000.00 bond, payment on which was conditioned—as is customary—on a subsequent showing that Greyhound had been "wrongfully enjoined or restrained." (Appendix A, p. 10.) The Company argued before the Ninth Circuit, however, that payment on the bond also should have been available if Greyhound subsequently won *before the arbitrator.*

The Ninth Circuit properly rejected this unique contention, noting that it was not supported by authority. (Appendix B, p. 21.)[11] In fact, the Company's position is directly contrary to Federal Rule of Civil Procedure 65(c), which provides, in relevant part, that:

> "No . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party *who is found to have been wrongfully restrained.*" [Emphasis added.][12]

There is no merit to Greyhound's contention that, because it ultimately prevailed in the arbitration, it was "wrongfully restrained" by the District Court. As Professor Moore has noted, an injunction bond

> "is not intended to cover payment of such sum as *the court may decree to be paid on the merits of the case,* but on the contrary, as we have said, to cover 'costs and damages' directly sustained as a result of an improvident issuance of the . . . preliminary injunction." *Moore,* supra, ¶65.09 at p. 65-94. [Emphasis added.] Accord, *Detroit Trust Co. v. Campbell River Timber Co.,* 98 F.2d 389, 393 (9th Cir. 1938).

If it is not proper for an injunction bond to be conditioned on *the court's* subsequent ruling on the merits of the case, *a fortiori,* it would be improper to condition it upon an *arbitrator's* subsequent ruling. As the Ninth Circuit properly recognized:

> "To accept Greyhound's contention that the bond should be payable in the event it wins the arbitration would fly in the face of our earlier holding that a showing by the plaintiff of probable success in the arbitration is not necessary to obtain a *Boys Markets* preliminary injunction." (Appendix B, p. 22.)

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cuit opinion, a union must still demonstrate that there is irreparable harm, and that it will be hurt more by the denial of an injunction than the employer will be hurt by its granting. Moreover, if the injunction is improperly granted, the union will be liable to the employer for any damages incurred. F.R.C.P. 65(c).

[11]Among the many cases in which employers have been enjoined to preserve the status quo pending arbitration, the Company is able to cite only two District Court cases in support of its position—*Steelworkers v. Blaw-Knox, supra,* and *Local 757 v. Budd Co., supra.* The former case, decided by a District Court in Pennsylvania, has been overruled by the subsequent decision of the Third Circuit in *United States Steel Corp. v. United Mine Workers,* which is discussed *infra.* The Company also refers to footnote 8 in the *Hoh* case (491 F.2d at 560-61), but the Second Circuit did not pass on the question of whether a bond should be conditioned on the arbitrator's ruling.

[12]It should be noted that section 7 of the Norris-LaGuardia Act also conditions payment on a bond on the "improvident or erroneous issuance" of an injunction. 29 U.S.C. section 107.

This holding by the Ninth Circuit is in accord with the ruling by the Third Circuit that payment on a bond in a section 301 action is proper only

> "if the preliminary injunction is found to have been improvidently granted or erroneously issued, that is, where the court did not hold a proper hearing or failed to make the factual determination mandated by Part V of the *Boys Markets* opinion or where the court erroneously issued a preliminary injunction over a labor dispute not covered by the contract grievance-arbitration provision." *United States Steel Corp. v. United Mine Workers,* 456 F.2d 483, 488 (3d Cir.), cert. den. 408 U.S. 923 (1972). Accord, *Amalgamated Transit Union v. Greyhound Lines, supra; Local 17 v. Ringsby Truck Lines,* 77 LRRM 2928 (Colo. Dist. Ct. 1971).[13]

Finally, there is no merit to Greyhound's contention that the decision of the Ninth Circuit means that unions "run virtually no risk" of liability for damages if they are ultimately unsuccessful on the merits at arbitration. (Petition, p. 24.) An employer may, of course, request the arbitrator to grant damages for any losses it claims to have suffered as a result of not having been able to make certain changes. Greyhound, however, failed to make such request at arbitration and thereby waived its right to do so. It can-

[13]In any event, the conditioning of a bond, like the setting of its amount, is a matter that is left to the sound discretion of the District Court. See *Moore, supra,* ¶65.09 at pp. 65-94; *Detroit Trust Co. v. Campbell River Timber Co., supra,* 98 F.2d at 393; *Washington Capitols Basketball Club v. Barry,* 304 F.Supp. 1193, 1203 (N.D. Calif.), aff'd 419 F.2d 472 (9th Cir. 1969). Therefore, the District Court may only be reversed on this issue if there is a clear showing of abuse of discretion.

not now complain that it is unable to recover its damages—if, in fact, it suffered any—from the injunction bond, which was properly conditioned on a a showing that the Company had been wrongfully restrained.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that this Court deny the Petition.

Dated, June 23, 1976.

Respectfully submitted,

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NEYHART & ANDERSON,

Attorneys for Respondents.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1584

GREYHOUND LINES, INC.,

Petitioner,

vs.

AMALGAMATED TRANSIT UNION,
DIVISION 1384, AFL-CIO
and
THE AMALGAMATED COUNCIL OF GREYHOUND
DIVISIONS, AFL-CIO,

Respondents.

Reply Brief of Petitioner

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and
The Amalgamated Council of Greyhound Divisions, AFL-CIO,

Respondents.

Reply Brief of Petitioner

Respondents' Brief in Opposition ("Res. Br.") starts by saying the case is moot, which it clearly is not, and goes on to avoid the issues the case presents. To the extent it is relevant to those issues at all, it proves this Court should review them.

I.

THE PETITION IS NOT MOOT

Respondents say that the injunction only remained in effect "pending a decision by arbitration;" that the arbitra-

tor has now decided the underlying dispute in favor of Petitioners; that the injunction has therefore "ceased to exist, by its own terms;" and, accordingly, that "the matter is moot." (Res. Br., 12-13)

The difficulty is that Respondents posted a bond when they obtained the preliminary injunction. The bond is conditioned upon the injunction's having been "wrongfully" issued. If this Court holds that the injunction was wrongfully issued, Respondents are liable upon the bond.* Therefore the question whether the injunction was wrongfully issued is not moot, and neither is this case. *Liner v. Jafco, Inc.*, 375 U.S. 301, 305 (1964) (injunction restrained picketing on construction site; construction completed pending appeal; appeal not moot since petitioners "plainly have 'a substantial stake in the judgment' [citation omitted], . . . [which] derives from the undertaking . . . in the injunction bond to indemnify them in damages if the injunction was 'wrongfully' sued out.").

Moreover, even apart from the bond, "this is particularly a case in which . . . '[this Court] should be astute to avoid hindrances'" to its review of the questions the Petition presents. That is so because this Court's "superintendence" of the District Courts' issuance of preliminary injunctions in arbitral labor disputes is "desirable" and the questions the case presents are "fundamental." *See Liner v. Jafco, Inc.*, above, 375 U.S. at 306.

*Petitioners also contend that Respondents should be liable upon that bond because the arbitrator ruled against Respondents. (Part IID, below) If this Court should so hold, once again Respondents will be liable upon the bond.

II.

THIS COURT SHOULD GRANT THE PETITION TO REVIEW THE QUESTIONS PRESENTED

A. The Jurisdiction of The Arbitrator.

The Petition asks this Court to determine whether a District Court may restrain an employer from taking action pending arbitration where the employer is willing to arbitrate the dispute and the injunction is not necessary to preserve the arbitrator's jurisdiction or ability to resolve the dispute. (Petition, pp. 2-3, 11-17)

Petitioners said the answer to that question was no, because the applicable principle is that a District Court cannot issue such an injunction except when necessary "to preserve the jurisdiction of the arbitrator," and then only when that remedy is the "only practical, effective means" of insuring that the exercise of that jurisdiction will not be "futile." (Petition, p. 15)

Respondents now seem to agree that that is the rule. (See Res. Br., 14-15, 21)* That concession, however, should not obscure the real issue which is that the courts below did not follow that rule. The District Court did not and could not find that the injunction it issued was necessary to preserve the arbitrator's jurisdiction or to ensure that the exercise of that jurisdiction was not futile. Neither did the Ninth Circuit. Instead, the Ninth Circuit held that the *Steelworkers Trilogy*** requires the courts to lower the

*Respondents say relief may be granted where "necessary" and to prevent "injury so irreparable that a decision by the Board in the Union's favor would be but an empty victory." (Res. Br., 14-15) Then they say that rule justified this injunction. (Res. Br., 21)

***United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

barriers to the granting of injunctive relief in arbitral labor disputes. (Petition, pp. 11, 21-22)

This Court has never squarely ruled on the issue as to whether and under what circumstances *Boys Markets*• permits a District Court to issue an injunction restraining action pending arbitration. Respondents apparently agree. (Res. Br., pp. 14-18) The Ninth Circuit decision stands as the only Court of Appeals decision affirming a District Court injunction restraining an employer from acting pending arbitration. Respondents agree again. (Res. Br., p. 19, n. 4) The Ninth Circuit decision is based upon the wrong rule. Now Respondents apparently agree to that too. (p. 3, above) But the decision stands, and lower courts will follow it if it is not reversed. This Court should review it and reverse it.

B. The Addition of New Terms to the Agreement.

The Petition asks this Court to determine whether a District Court may add onto a collective bargaining agreement the term that an employer shall preserve the status quo pending arbitration, and then enforce the term by issuing a preliminary injunction. (Petition, pp. 3, 17-19)

The Ninth Circuit in effect did that, and therefore its decision is contrary to the decision in *Detroit News. Pub. Ass'n v. Detroit Typo. Union No. 18*, 471 F.2d 872 (6th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973). (Petition, pp. 3, 18-19) The decision is also wrong, because it is for the arbitrator, not the Court, to decide whether a collective bargaining agreement contains such a provision and, if so, how to enforce it. (Petition, pp. 17-19)

Respondents' first answer is that *Detroit News* does not conflict with the Ninth Circuit's decision here. (Res. Br.,

•*Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970).

pp. 21-22, n. 7) But it does. *Detroit News* ruled that a District Court cannot construe a "status quo" clause in a contract, much less add one to it, and cannot make a "factual determination as to whether there has been a violation" of the clause. *Id.*, 471 F.2d at 875. Here the District Court in effect added such a clause to the agreement, and then went on to enforce it.

Next, Respondents argue that "the logical corollary to the *Boys Markets* decision is that federal courts may also issue injunctions against employers to preserve the status quo pending arbitration," apparently without regard to whether the employer promised to maintain the status quo pending arbitration. (Res. Br., p. 17) The Ninth Circuit said it rejected that premise (Opinion, Petition, App. B, pp. 20-21), but its decision in effect adopted it.• That premise is false. *Boys Markets* holds that a no strike clause is the quid pro quo for the employer's promise to arbitrate, not for an employer's promise not to act pending arbitration; indeed, *Boys Markets* stands for the proposition that an employer who has agreed to arbitrate a dispute has done all he promised to do, and therefore has done no wrong to enjoin.

The Ninth Circuit decision misapplies *Boys Markets* and makes Respondents' false premise the law. Therefore, and because the decision conflicts with *Detroit News,* this Court should review the Ninth Circuit's decision and reverse it.

•Other language in the Opinion seems to show that the Ninth Circuit proceeded upon the premise which it said it was rejecting.

> "We hold that a plaintiff, without regard to whether he is the employer or the union, seeking to maintain the status quo pending arbitration pursuant to the principles of *Boys Market*, need only establish that the position he will espouse in arbitration is sufficiently sound to prevent the arbitration from being a futile endeavor." (Opinion, Petition, App., B, p. 18)

C. The Nonshowing of Likelihood of Success on the Merits.

The Petition asks this Court to determine whether a District Court may enjoin an employer from acting pending arbitration without finding that the union has a likelihood of success on the merits before the arbitrator. The Second Circuit answered that question no. *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 561 (2d Cir. 1974). The Ninth Circuit answered it yes here. (Petition, p. 3)

Respondents say, first, that the Ninth Circuit decision does not really conflict with *Hoh* because *Hoh* simply requires that there be 'some likelihood of success' in the sense that the underlying claim . . . is not 'plainly without merit.'" (Res. Br., p. 27) The Ninth Circuit speculated that perhaps that is indeed what *Hoh* meant. (Opinion, Petition, App. B, p. 18)

That is not, however, what *Hoh* held or said. *Hoh* held that a union must show some likelihood of success on the merits; *Hoh* expressly says that "*at least* this much is required . . . ." (491 F.2d at 561; emphasis added) *Hoh* does not hold that a union must merely prove its claim to be not "plainly without merit." *Hoh* says it "would be inequitable in the last degree to grant an injunction" where a claim is plainly without merit, and shows by example of that last degree what absurd and inequitable results would follow were a union not required to show likelihood of success on the merits. This is the whole passage from which Respondents and the Ninth Circuit take the "plainly without merit" phrase (Res. Br., pp. 26-27); it speaks for itself and, we believe, proves the point:

> "Furthermore, the 'ordinary principles of equity' referred to as a guide in the portion of the *Sinclair* dissent that was approved in *Boys Markets* include some likelihood of success. At least this much is required by Judge Frank's liberal formulation in *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953). We think this must mean not simply some likelihood of success in compelling arbitration but in obtaining the award in aid of which the injunction is sought. Although Courts have been directed by the *Steelworkers' Trilogy*, 363 U.S. 564, 574, 593, 80 S.Ct. 1343, 1347, 1358, 4 L.Ed.2d 1403, 1409, 1424 (1960), to be liberal in construing agreements to arbitrate, this instruction does not extend to the grant of ancillary relief; on such a matter they must continue to exercise the sound discretion of the chancellor. It would be inequitable in the last degree to grant an injunction pending arbitration which was costly to a defendant on the basis of a claim which although arguably arbitrable was plainly without merit.
>
> "We see little reason to think the unions here have met the requirement of showing some likelihood of ultimate success." 491 F.2d at 561.

The Ninth Circuit decision therefore conflicts with *Hoh*, and this Court should review the Ninth Circuit decision to resolve the conflict.

Respondents argue, however, that the rule is clear, and the rule is that there can be no inquiry into the merits. (Res. Br., pp. 23-27) But their brief discloses their error. It says their "contention" before the District Court was that Petitioner's "action would violate the collective bargaining agreement . . .", and that had "the proposed changes been implemented prior to arbitration, irreparable harm would have resulted." (Res. Br., p. 20) But if their "contention" were wrong on the merits, as the arbitrator ultimately found it to be, then Petitioner's putting the changes into effect pending arbitration could not have irreparably injured Respondents for the very good reason that one cannot be irreparably injured by being deprived

of a right he does not have. Accordingly, as a matter of logic a Court cannot find irreparable injury without finding on the merits, and Respondents' brief proves it.

The Ninth Circuit held that a union need only show irreparable injury to obtain an injunction restraining an employer from taking action pending arbitration. That is not the rule. (Part IIA, above) But if it is, that is all the more reason that the District Court must look to the merits before issuing such an injunction; again, one cannot be irreparably injured by being deprived of a right which, on the merits, he does not have.

This Court should review the Ninth Circuit decision in order to lay down rules with respect to when and to what extent a District Court must look to the merits before issuing an injunction restraining an employer from taking action which, on the merits, he may have a perfect right to take.

D. The Conditioning of the Bond.

The Petition asks this Court to determine whether a District Court can issue a preliminary injunction against an employer over an arbitral labor dispute without conditioning the bond to call for payment upon the union's losing before the arbitrator. The bond should be so conditioned because one who wins on the merits had a right to do what the preliminary injunction prevented him from doing; therefore he has been wrongfully restrained and should recover on the bond. That is the normal rule and it should be applied here. (Pet. 22-24).

Respondents reply that the normal rule is that one who wins on the merits does not win on the bond, citing 7 *Moore's Federal Practice* ¶ 65.09, page 65-94, and *Detroit Trust Co. v. Campbell River Timber Co.*, 98 F.2d 389 (9th Cir. 1938). Those authorities are beside the point. They

merely state that the amount of the bond should not cover payment for such damages as might ultimately be awarded on the merits of the case. They do not consider the circumstances under which a wrongful restraint has occurred.* That is the question which is presented by the Petition. It is answered by *Arkadelphia Milling Co. v. St. Louis S.W. Ry.*, 249 U.S. 134, 144 (1949), which holds that one who wins on the merits has been wrongfully restrained and is entitled to recover on the bond for the injury that restraint caused. *Atomic Oil Co. v. Bardahl Oil Co.*, 419 F.2d 1097, 1102 (10th Cir.), *cert. denied*, 397 U.S. 1063 (1970) and *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 243 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971), are in accord with *Arkadelphia*.

Here the arbitrator decided that the Company had the right under the Agreement to do what the preliminary injunction prevented it from doing. This Court should determine whether an employer in circumstances such as these is entitled to recover on the bond. It should do so not only because it has never before passed upon that question, but also because the decision below establishes a manifestly unfair rule. Indeed, even Respondents do not dispute that it is unfair, and cannot. He who wins on the merits ought not to lose on the bond.

**United States Steel Corp. v. United Mine Workers*, 456 F.2d 483 (3rd Cir.), *cert. denied*, 408 U.S. 923 (1972) (Res. Br., p. 30) merely held that attorneys' fees should be covered by the bond. The language cited by Respondents is dictum. *Local 17 v. Ringsby Truck Lines*, 77 LRRM 2928 (D. Col. 1971) doesn't even mention the proposition for which it is cited.

Similarly, Respondents are without authority for their argument that the conditioning of the bond is within the district court's discretion. (Res. Br., p. 30, n. 13) The cases cited involve the *amount* of a bond, not the conditions on which it is payable.

CONCLUSION

The Petition should be granted as to all four questions presented.

Dated: July 2, 1976.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1584

GREYHOUND LINES, INC.,

Petitioner,

vs.

AMALGAMATED TRANSIT UNION, DIVISION 1384, AFL-CIO
and
THE AMALGAMATED COUNCIL OF GREYHOUND DIVISIONS, AFL-CIO,

Respondents.

Supplemental Brief of Petitioner

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Supplemental Brief of Petitioner

Pursuant to Rule 24(5) of this Court, Petitioner respectfully calls the Court's attention to its recent decision in *Buffalo Forge Co. v. United Steelworkers of America, AFL-CIO, et al.*, ...U.S..... (No. 75-339, July 6, 1976), unofficially reported at 1976 CCH Sup. Ct. Rep. p. B4953. The *Buffalo Forge* decision was not available at the time of filing Petitioner's last brief.

Buffalo Forge concerned an employer's suit to enjoin a union from engaging in a sympathy strike pending an arbitrator's ruling as to whether that sympathy strike violated the no strike clause in the parties' collective bargaining agreement. This case concerns a union's suit to enjoin an employer from taking action pending an arbitrator's ruling as to whether that employer action violated a clause in the parties' collective bargaining agreement. Therefore this case is simply the other side of the coin from *Buffalo Forge*.

Buffalo Forge held that a district court could not issue an injunction restraining the sympathy strike pending arbitration. It based that holding on these principles:

> "This is not what the parties have bargained for. Surely it cannot be concluded here, as it was in *Boys Markets*, that such injunctions pending arbitration are essential to carry out promises to arbitrate and to implement the private arrangements for the administration of the contract. As is typical, the agreement in this case outlines the prearbitration settlement procedures and provides that if the grievance 'has not been . . . satisfactorily adjusted,' arbitration may be had. Nowhere does it provide for coercive action of any kind, let alone judicial injunctions, short of the terminal decision of the arbitrator. The parties have agreed to grieve and arbitrate, not to litigate. They have not contracted for a judicial preview of the facts and the law. Had they anticipated additional regulation of their relationships pending arbitration, it seems very doubtful that they would have resorted to litigation rather than to private arrangements. The unmistakable policy of Congress stated in 29 U.S.C. § 173(d), 61 Stat. 153, is that 'Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' *Gateway Coal Co. v. United Mine Workers, supra,* at 377. But the parties' agreement to adjust or to arbitrate their differences themselves would be eviscerated if the courts for all practical purposes were to try and decide contractual disputes at the preliminary injunction stage." ....U.S..... at ....., 1976 CCH Sup. Ct. Rep. at pp. B4965-66 (footnote omitted).

Those principles apply with equal force to this case. The only "difference" is that here the parties are reversed and the union is plaintiff. That "difference" makes no difference, because the principles are the same and they do not change with who the plaintiff happens to be.

The Ninth Circuit decision in this case is contrary to those principles, and it establishes the opposite principles for cases where the union is plaintiff. This Court should grant the petition for certiorari, reverse the Ninth Circuit decision, and hold that the same principles that apply where the employer is plaintiff apply as well where the union is plaintiff.

Dated: July 27, 1976.

Respectfully submitted,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

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Table of Authorities Cited

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SUPPLEMENTAL BRIEF OF RESPONDENTS

Pursuant to Rule 24(5) of this Court, Respondents file this brief in response to the Supplemental Brief of Petitioner submitted on July 27, 1976.

Petitioner's supplemental brief contends that this Court's recent decision in *Buffalo Forge Co. v. United*

Steelworkers of America, AFL-CIO, et al., ... U.S. ..... (No. 75-339, July 6, 1976), 92 LRRM 3032, contains principles that apply with equal force to the case herein. Petitioner has misread the *Buffalo Forge* decision.

The issue presented to the Court in *Buffalo Forge* was whether the *Boys Markets* (398 U.S. 235) exception to the Norris-LaGuardia Act (29 U.S.C., Sections 101-15) was applicable when an employer sought to enjoin a *sympathy strike* by a union with which it had a collective bargaining agreement. The *Boys Markets* exception is a "narrow" one (398 U.S. at 253), and applies only

> "[w]hen a strike is sought to be enjoined because it is over *a grievance which both parties are contractually bound to arbitrate* . . . ." 398 U.S. at 254. [Emphasis added.]

Buffalo Forge did not fall within the narrow *Boys Markets* exception. As this Court explained:

> "The driving force behind *Boys Markets* was to implement the strong congressional preference for the private dispute settlement mechanisms agreed upon by the parties. Only to that extent was it held necessary to accommodate §4 of the Norris-LaGuardia Act to §301 of the Labor Management Relations Act and to lift the former's ban against the issuance of injunctions in labor disputes. Striking over an *arbitrable dispute* would interfere with and frustrate the arbitral processes by which the parties had chosen to settle a dispute. The quid pro quo for the employer's promise to arbitrate was the union's obligation not to strike

> *over issues that were subject to the arbitration machinery.* . . .
>
> "*Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract.* The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; *neither its causes nor the issue underlying it were subject to the settlement procedures provided by the contract between the employer and respondents.* The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain." 92 LRRM at 3036. [Emphasis added.]

The rationale behind the *Buffalo Forge* decision has no application to this case. The dispute between the Union and the Company is clearly subject to the arbitration procedures of the contract. Greyhound has never contended otherwise, and, in fact, the dispute has been arbitrated and an award issued.

Moreover, the validity of the injunction in the present case does not depend on its coming within the narrow *Boys Markets* exception to Norris-LaGuardia. As this Court noted in *Buffalo Forge*, the *Boys Markets* exception was necessary "to accommodate §4 of the Norris-LaGuardia Act to §301 of the Labor Management Relations Act . . . ." No such accommodation is necessary in the present case, however, since the acts enjoined do not fall within any of the categories set forth in section 4 of Norris-LaGuardia.

In sum, the decision in *Buffalo Forge* does not help Petitioner in the present case. While an injunction in *Buffalo Forge* was not essential to make the arbitration provisions of the collective bargaining agreement meaningful, an injunction was essential in the present case to prevent irreparable harm that would have reduced any arbitration decision in favor of the Union to "an empty victory." *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R.R. Co.,* 363 U.S. 528, 531 (1960).

Actually, the *Buffalo Forge* decision supports the Union's position in the present case. The Union contends that the District Court properly refused to speculate as to which party was more likely to prevail on the merits at arbitration. (Respondents' Brief, pp. 22-27). The reason for the Union's position is that such speculation would involve consideration of the merits by a court. The parties to the collective bargaining agreement, however, have reserved, for the arbitrator, the role of considering the merits. Thus, for a court to consider the merits would involve a judicial intrusion into the area set aside for the arbitrator.

The Union's position is supported by the *Buffalo Forge* decision:

> "The dissent suggests that injunctions should be authorized in cases such as this at least where the violation, in the court's view, is clear and the court is sufficiently sure that the parties seeking the injunction will win before the arbitrator. But this would involve hearings, findings and judicial interpretations of collective-bargaining contracts.

> It is incredible to believe that the courts would always view the facts and the contract as the arbitrator would; and *it is difficult to believe that the arbitrator would not be heavily influenced or wholly pre-empted by judicial views of the facts and the meaning of contracts if this procedure is to be permitted."* 92 LRRM at 3037-38. [Emphasis added.]

In sum, the Ninth Circuit decision is not contrary to *Buffalo Forge* but, in fact, is buttressed by that case. Accordingly, *Buffalo Forge* lends no support to the Petition for Certiorari, which should be denied.

Dated, August 5, 1976.

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